1850.

SUPREME COURT OF THE UNITED STATES.

No. 179.

EUGENE LEITENSDORFER & JOAB HOUGHTON, PL'FFS IN ER.,

vs.

JAMES J. WEBB.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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A complete and perfect transcript of the final judgment, and all the proceedings therein, and of all the original papers, in a certain suit in the supreme court of the Territory of New Mexico, at the regular term held in the city of Santa Fé, in said Territory, in the month of January, Ao. Do. 1853, wherein Eugene Leitensdorfer and Joab Houghton, trading under the name and style of E. Leitensdorfer and Company, were plaintiffs, and James J. Webb was defendant, in a plea of assumpsit, as follows, viz:

Be it remembered that heretofore, to wit, on the 30th day of June, Ao. Do. 1849, James J. Webb sued out of the office of the clerk of the then circuit court of said county of Santa Fé a certain writ of attachment against Eugene Leitensdorfer and Joab Houghton, which is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

To the sheriff of said county, greeting:

You are hereby commanded to attach Eugene Leitensdorfer and Joab Houghton, doing business under the name and style of E. Leitensdorfer & Co., by all singular their lands and tenements, goods, chattels, moneys, effects, and credits, in whosoever hands or possession the same may be found in your county, or so much thereof as shall be sufficient to satisfy the sum of eight thousand two hundred and ninety-seven dollars and forty-nine cents, and costs of suit, so that he be and appear before the circuit court in and for the county of Santa Fé, to be begun and held in the city of Santa Fé, on the fourth Monday of October next, at 10 o'clock a. m. of said day, to answer the complaint of James J. Webb, as set forth in the foregoing petition, and that you summons the said Eugene Leitensdorfer and Joab Houghton that they be and appear before the circuit court at the time and place aforesaid; and that you also summon all such persons as garnishees in your county as may be directed by the plaintiff or his counsel, that they be and appear before the circuit court at the time and place aforesaid, to answer such interrogatories as the plaintiff or his counsel may propound. In this fail not.

Given under my hand and seal this 30th day of June, 1849.

(Signed) J. M. GIDDINGS, *Clerk.*
By J. B. GIDDINGS, *D. C.*

And afterwards, to wit, on the day and year last aforesaid, the sheriff made his return on said writ, in the words and figures following, to wit:

Executed the within writ of attachment by levying on all of the goods, wares, merchandise, books, and credits in the store and warehouse of E. Leitensdorfer & Co., and now in the possession of C. H. Merritt, sheriff, as pr. invoice, with the attachment of R. Campbell vs. E. Leitensdorfer & Co., and also levied on all of the right, title, and interest of the said E. Leitensdorfer to one storehouse, situated near the southwestern corner of the plaza in the city and county of Santa Fé, and formally occupied by said firm of E. Leitensdorfer & Co., as a storehouse, and also attached all of the goods, wares, merchandise, moneys, credits, and effects in the hands of Isaac McCarty, and summoned him as a garnishee, to appear at the next term of the circuit court, to be begun and holden in the city and county of Santa Fé, on the fourth Monday of October next, to answer such questions as the plaintiff, or his counsel, may propound, and summoned the defendant, Joab Houghton, to be and appear at the next term of the circuit court, to be begun and holden in the city and county of Santa Fé, on the fourth Monday of October next, as I am within commanded.

(Signed) C. H. MERRITT,
Sheriff.
By S. P. CARTER, *D. S.*

JUNE 30*th*, 1849.

And afterwards, to wit, on the 2d day of July, Ao. Do. 1849, the sheriff made another return on said writ, in the words and figures following, to wit:

Summoned West as a garnishee to appear at the next term of the circuit court, to be begun and holden in the city and county of Santa Fé, on the fourth Monday of October next, to answer such questions as the plaintiff, or his counsel, may propound to you; and also attached all of the goods, wares, merchandise, moneys, credits, and effects he may have in his hands belonging to the said firm of E. Leitensdorfer & Co., as I am commanded by the plaintiff's counsel.

(Signed) C. H. MERRITT,
Sheriff.
By S. P. CARTER, *D. S.*

JULY 2*d*, 1849.

And afterwards, to wit, on the 2d day of July, Ao. Do. 1849, said sheriff made another return on said writ, in the words and figures following, to wit:

Executed the within writ of attachment by summoning Antonio Constante and A. D. Murphy as garnishees, to appear at the October term of the circuit court, to be begun and holden in the city and county of Santa Fé, on the fourth Monday of October next,

to answer such interrogatories as the plaintiff, or his attorney, may propound to you; also attach all of the goods, wares, merchandise, moneys, and effects you may have in your hands belonging to E. Leitensdorfer, or Joab Houghton, or E. Leitensdorfer & Co., as I am commanded.

(Signed) C. H. MERRITT,
Sheriff.
By S. P. CARTER, *D. S.*

JULY 2*d*, *Ao. Do.* 1849.

And afterwards, to wit, on the 3d day of July, Ao. Do. 1849, the said sheriff made another return on said writ, in the words and figures following, to wit:

Summoned Isaac McCarty on behalf of the firm of St. Vrain & McCarty, as a garnishee, to appear at the October term of the circuit court, in and for the county of Santa Fé, to be begun and holden in the city and county of Santa Fé, on the fourth Monday of October next, to answer such interrogatories as the plaintiff or his counsel may propound, and attach in the hands of the aforesaid firm all of the goods, wares, merchandise, moneys, credits, and effects of Joab Houghton, E. Leitensdorfer, or E. Leitensdorfer & Co., that they may have in their possession. July 3d, 1849.

(Signed) C. H. MERRITT,
Sheriff.
By S. P. CARTER,
D. S.

And afterwards, to wit, on the day and year last aforesaid, the said sheriff made another return on said writ, in the words and figures following, to wit:

Summoned Doyle, on behalf of the firm of , as a garnishee, to appear at the next October term of the circuit court, in and for the county of Santa Fé, to be begun and held in the *in the* city and county of Santa Fé, on the fourth Monday of October next, to answer such interrogatories as the plaintiff or his counsel may propound, and attach in the hands of the aforesaid firm all of the goods, wares, merchandise, moneys, credits, and effects of Joab Houghton, E. Leitensdorfer, and E. Leitensdorfer & Co., that they may have in their possession. July 3d, 1849.

(Signed) C. H. MERRITT,
Sheriff.
By S. P. CARTER, *D. S.*

And afterwards, to wit, on the 30th day of June, Ao. Do. 1849, the said Webb filed in said circuit court an affidavit, in the words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

This affiant, James J. Webb, being duly sworn, makes oath, and says that Eugene Leitensdorfer and Joab Houghton, doing business under the name and style of E. Leitensdorfer and Company, are justly indebted to James J. Webb, in the sum of eight thousand two hundred ninety-seven $\frac{49}{100}$ dollars, ($8,297 49,) after allowing all just credits and offsets on account of a certain promissory note drawn by said firm of E. Leitensdorfer & Co., in favor of the firm of Doan, King & Co., and by said last-mentioned firm made payable to J. J. Webb, being the same which is set forth in the petition, and being for the amount of eight thousand two hundred ninety-seven $\frac{49}{100}$ dollars, ($8,297 49;) and this affiant has good reason to believe that the said Eugene Leitensdorfer and Joab Houghton, doing business under the style and firm of E. Leitensdorfer & Co., have fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors.

(Signed) JAMES J. WEBB.

Sworn and subscribed before me, the 30th of June, 1849.

(Signed) J. M. GIDDINGS,
Clerk.

And afterwards, to wit, on the day and year last aforesaid, the said Webb filed in said circuit court his petition, in the words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

October term, Santa Fé county circuit court.

To the honorable the circuit court in and for the county and territory aforesaid:

Your petitioner, James J. Webb, would respectfully represent that Eugene Leitensdorfer and Joab Houghton, defendants, doing business under the name and style of E. Leitensdorfer & Co., are justly indebted to him in the sum of eight thousand two hundred ninety-seven $\frac{49}{100}$ dollars, ($8,297 49,) with interest, which indebtedness accured on account of a certain promissory note dated at St. Louis, on the first day of March, in the year eighteen hundred and forty-eight, drawn by E. Leitensdorfer & Co., payable to the order of the firm of Doan, King & Co., and by said last-mentioned firm made payable to J. J. Webb, or order, which said note is negotiable, and is in the following words, letters, and figures, to wit:

ST. LOUIS, 1*st March*, 1848.

Six months after date, we, the subscribers, of Santa Fé county, of , and province of New Mexico, promise to pay to the order of Doan, King & Co., (a mercantile firm, composed of Job P. Doan and Wyllys King, of St. Louis, and Richard Bigelow, of New York,) eight thousand two hundred ninety-seven $\frac{49}{100}$ dollars, for value received, negotiable and payable, without defalcation or discount, with interest, after maturity.

Which note is signed, E. Leitensdorfer & Co., and is endorsed by Doan, King, & Co., and over their signature the following words, to wit: "Pay J. J. Webb or order;" and the said defendants have refused and neglected, and still refuse and neglect, to pay the said debt, although they have often been requested so to do. Therefore your petitioner prays, that he may have judgment of this honorable court for his said debt, and damages for the detention of the same; and thus, as in duty bound, &c., &c., &c.

(Signed) R. H. WEIGHTMAN,
Atty. for Plaintiff.

TERRITORY OF NEW MEXICO,
County of Santa Fé.

James J. Webb, being duly sworn according to law, makes oath and says, that the facts set forth in the foregoing petition are, to the best of his knowledge and belief, true.

(Signed) JAMES J. WEBB.

Sworn to and subscribed before me, this 30th of June, 1849.

(Signed) J. M. GIDDINGS,
Clerk.

And afterwards, to wit, on the day and year last aforesaid, the said J. J. Webb filed in the said circuit court his bond, in the words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

Know all men by these presents, that James J. Webb, as principal, and F. X. Aubry and T. W. Flowrnay, as secureties, are held and firmly bound unto the Territory of New Mexico, in the sum of seventeen thousand dollars, (17,000,) for the payment of which we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents. Sealed with our seals, and dated this thirtieth day of June, 1849.

The condition of the above obligation is such, that whereas Jas. J. Webb is about to institute a suit by attachment, in and before the circuit court of the county of Santa Fé, and Territory afore-

said, as plaintiff, against Eugene Leitensdorfer and Joab Houghton, doing business under the name and style of E. Leitensdorfer & Co., for the sum of eight thousand two hundred ninety-seven $\frac{49}{100}$ dollars, ($8,297 $\frac{49}{100}$,) returnable on the fourth Monday of October, 1849, it being the first day of the next term of the said court, and the twenty-second day of the month aforesaid: Now if the said plaintiff shall well and truly prosecute his said action without delay, and with effect, and refund all sums of money that may be adjudged to be refunded to the defendants, and pay all damages that may accrue to any defendant or any garnishee by reason of this attachment, or any process or judgment thereon, then this obligation to be null and void; otherwise, to be of in full and effect.

(Signed) JAS. J. WEBB, [SEAL.]
F. X. AUBRY, [SEAL.]
T. W. FLOWRNEY, [SEAL.]
R. H. WEIGHTMAN, [SEAL.]

Approved and filed the 30th June, 1849.

(Signed) J. M. GIDDINGS,
Clerk.
By J. B. GIDDINGS,
D. C.

And afterwards, to wit, on the 25th day of October, Ao. Do. 1849, the said defendants filed in said circuit court their demurrer to the said petition of the said J. J. Webb, in the words and figures following, to wit:

IN CIRCUIT COURT,
Santa Fé county.

October term, 1849.

LEITENSDORFER
vs.
JAS. J. WEBB. } Attachment.

And said defendants, by their attorneys, come and say, that the said petition of said plaintiff is not sufficient in law, and therefore they pray judgment of the court that the costs so unreasonably sustained by the defendants may be paid them.

And for cause show—

1st. That at the time averred in said declaration as the date of execution of the note decribed in said declaration, there is no averment that E. Leitensdorfer and Joab Houghton, defendants in this case, were partners when said note was executed.

2d. That the endorsers of said note are not sufficiently described in said petition.

3d. That the note as copied in said petition is signed by nobody, and therefore obligatory upon no one.

And afterwards, to wit, on the 1st day of November, Ao. Do. 1849, an order of said court was made in the words and figures following, to wit:

In the Santa Fé circuit court, June term, 1859.

CAMPBELL
vs.
LEITENSDORFER.

In the same court, to October term, 1849.

KELLY
vs.
SAME.

In same court, to October term, 1849.

WEBB
vs.
SAME.

Attachments having been sued out of the circuit court in and for said county aforesaid, in favor of R. Campbell, in favor of Eugene Kelly, and one in favor of James J. Webb, and against said Leitensdorfer & Co., and there being a large stock of goods levied upon on the said attachments, and there being also a large number of debts due to and uncollected by said Leitensdorfer & Co., or by the assignees of E. Leitensdorfer, Thomas Biggs, and Hugh N. Smith; and it being deemed most advisable to collect the said debts, and to convert the goods and effects of E. Leitensdorfer & Co. into money, and no objection to such a disposition being made on the part either of the creditors aforesaid or the aforesaid assignees, it is ordered and decreed by the court, with the consent of the creditors, and for the purpose aforesaid, that the goods and effects and accounts be placed in the hands of Thomas Biggs, as a trustee, (he not waving or losing any right as assignee,) for sale and collection, which he will proceed to execute with all reasonable despatch, regard being had to the interest of the assignees and the creditors of said Leitensdorfer & Co. It is further ordered that said goods and effects be sold for cash, and the same shall be held by said trustee, subject to the order of the court that shall try the suits between E. Leitensdorfer & Co. and the creditors and the assignees. It is further ordered and decreed that the said Thomas Biggs, as trustee, shall, before entering on the discharge of his trust, give security in the sum of twenty thousand dollars for the faithful performance of the conditions of this decree; and he shall receive

the sum of ten per centum on the money arising from all sales or collections, in full compensation for his services as trustee aforesaid, and he shall also be paid all necessary expenses in travel and in settling up the business, and in the disposal of the goods, or in making collections as aforesaid, the salary and hire of a clerk to assist in the adjustment of the same. It is also ordered and decreed that a true and perfect inventory of all the goods and effects and the debts due to said Leitensdorfer & Co. be taken immediately after entering on his duties as trustee, which can at all times be subject to examination by the creditors of said Leitensdorfer & Co., the expense of taking which shall be paid from the sales of the goods and effects aforesaid.

As counsel of plaintiff and defendant, we consent that the foregoing be made an order and decree of the Santa Fé circuit court.

(Signed) P. J. PILLANS,
Att'y for Kelly.
R. H. WEIGHTMAN,
Att'y for Campbell and Webb.
ANGNEY, H. N. SMITH, & QUINN,
Att's for Defendants.

And afterwards, to wit, on the day and year last aforesaid, the said Thomas Biggs filed in said circuit court his bond as trustee, in the words and figures following, to wit:

Know all men by these presents that we, Thomas Biggs, as principal, and H. N. Smith, Isaac McCarty, Oran St. Vrain, George Peacock, R. T. Brent, as securities, are held and firmly bound unto the Territory of New Mexico in the sum of twenty thousand dollars; to which payment, well and truly to be made, we bind ourselves, our heirs, and executors firmly by these presents. Sealed with our seals, and dated this 6th day of August, Ao. Do. 1849.

The conditions of this obligation is such, that whereas suits by attachment have been commenced in the Santa Fé circuit court by R. Campbell, Eugene Kelly & Co., and James J. Webb, against E. Leitensdorfer & Co., and a certain lot of goods attached in the hands of H. N. Smith and Thomas Biggs, assignees of E. Leitensdorfer, which said goods, by order of the judge of the Santa Fé circuit court, made this day, have been placed in the hands of said Thomas Biggs, as trustee, to sell as perishable property; and whereas said decree orders that said Biggs shall sell said goods for cash, and collect the outstanding debts due to E. Leitensdorfer & Co., and account for said proceeds, subject to the order of the court which shall try the suits between E. Leitensdorfer & Co., their assignees and creditors: Now if the said Thomas Biggs shall abide by and perform the order and decree of the judge of the Santa Fé circuit court, and shall have the proceeds of said sales and collections, subject to the order of the court which shall try said suits be-

tween E. Leitensdorfer & Co. and their creditors, then and in that event, this obligation shall be null and void; otherwise, remain in full force and virtue; and it is further agreed that the bond may be sued upon, in the name of the Territory, to the use of any party or person aggrieved by the failure to comply with the conditions herein contained.

(Signed)
THOMAS BIGGS, [SEAL.]
HUGH N. SMITH, [SEAL.]
ISAAC McCARTY, [SEAL.]
ORAN ST. VRAIN, [SEAL.]
R. T. BRENT, [SEAL.]
G. H. PEACOCK, [SEAL.]

And afterwards, to wit, on the 10th day of November, Ao. Do. 1849, the following order was made by said court, to wit:

"Ordered, that court adjourn until the next court in course; all unfinished business adjourned until that time.

And afterwards, to wit, on the 25th day of February, Ao. Do. 1850, the following order was made by said court, to wit:

JAMES J. WEBB
vs.
E. LEITENSDORFER, & Co. } Attachment continued.

And afterwards, to wit, on the 31st day of July, Ao. Do. 1850, the following order was made by said court, to wit:

WEBB
vs.
LEITENSDORFER. } Continued.

And afterwards, to wit, on the 2d day of November, Ao. Do. 1850, said court made the following order, to wit:

The court then adjourned until the third Monday in November inst., and ordered all unfinished business to be over until that time.

And afterwards, to wit, on the 19th day of September, Ao. Do. 1851, the following motion and order was made:

The United States district court, for the first judicial district of the Territory of New Mexico, held in the county of Santa Fé, in said Territory, to wit:

JAMES J. WEBB
vs.
E. LEITENSDORFER, & Co. }

The plaintiff, by his counsel, moves the court to file the papers in the above case in the court, and that the same may be made a part of the records and papers of this court.

(Signed) ASHURST & TULY.
For motion.

Whereupon it is ordered by the court, the same be entered upon the docket.

And afterwards, to wit, on the 25th day of March, Ao. Do. 1852, the said defendants filed in the said district court the following plea, to wit:

Attachment in district court, Santa Fé county, March term, 1852.

EUGENE LEITENSDORFER AND
JOAB HOUGHTON
ads.
JAMES J. WEBB.

And the said defendants, by their attorneys, come and defend the wrong and injury, when, &c., and pray judgment of the said action, because they say, that at the time of the institution of this suit, to wit, on the 30th day of June, Ao. Do. 1849, they, the said defendants, had not fraudulently disposed of their property and effects, so as to kinder, delay, or defraud their creditors, and this the said defendants are ready to verify; wherefore they pray judgment of the said action, and that the same may be dismissed, &c.

(Signed) SMITH & GARY,
Attys. for Defendants.

And afterwards, to wit, on the day and year last aforesaid, the following motion and order was made, and the following affidavit filed in said cause, to wit:

Attachment in district court, Santa Fé county, March term, 1852.

EUGENE LEITENSDORFER AND
JOAB HOUGHTON
ads.
JAMES J. WEBB.

Hugh N. Smith, attorney for the said defendants, having duly sworn, deposes and says, that the securities in said attachment bond, given in the above-entitled cause, are neither of them residents of the Territory of New Mexico, nor have they any property, or if any, to only a trifling amount, in this Territory, and that said bond is not a good and sufficient bond for the sum of seventeen thousand dollars.

(Signed) H. N. SMITH.

Sworn to and subscribed before me, this 23d day of March, Ao. Do. 1852.

(Signed) R. H. TOMPKINS,
Clk.

JAMES J. WEBB
vs.
E. LEITENSDORFER & Co. } Attachment.

This cause came on to be heard upon the following motion:

Defendants move the court to rule the plaintiff to additional security in the attachment bond—

1st. Because the securities are not residents of the county and Territory as required by law.

2d. Because the securities in said bond are not owners of sufficient property in the Territory, to make them responsible for such an amount; which motion being fully understood by the court, it is ordered, that the plaintiff be required to file an additional bond in the cause, to be approved of by the court, on or before the first day of the next term of this court, else become nonsuit—but with leave to file the same during this term, and go to trial.

And afterwards, to wit, on the 26th day of March, Ao. Do. 1852, the said defendants filed in said court the following bond, to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

Know all men by these presents, that I, James J. Webb, as principal, and James M. Giddings, William T. Dalton, and Preston Beck, as securities, are held and firmly bound unto the Territory of New Mexico, in the sum of seventeen thousand dollars, to the payment of which, we bind ourselves, our heirs, executors, and administrators; sealed with our seals, and dated this March twenty-sixth, Ao. Do. 1852.

The condition of the above obligation is such, that whereas James J. Webb did on the thirtieth day of June, Ao. Do. 1849, institute and command a suit by attachment in and before the circuit court of the county of Santa Fé, Territory aforesaid, as plaintiff, against Eugene Leitensdorfer and Joab Houghton, partners, trading and doing business under the name and style of E. Leitensdorfer & Co., for the sum of eight thousand two hundred ninety-seven $\frac{49}{100}$ dollars, returnable on the fourth Monday of October, Ao. Do. 1849, it being the first day of the next term of the said circuit court; now if the said plaintiff shall well and truly prosecute his said action without delay and with effect, and refund all sums of money that may be adjudged to be refunded to the defendants, and pay all damages that may accrue to any defendant or garnishee by reason of this attachment, or any process of judgment thereon, then this obligation to be null and void; otherwise, to remain in full force and effect.

(Signed) JAMES J. WEBB, [SEAL.]
J. M. GIDDINGS, [SEAL.]
W. T. DALTON, [SEAL.]
PRESTON BECK, JR. [SEAL.]

I hereby approve of the penalty and sureties in this bond. March 26th, 1852.

(Signed) R. H. TOMPKINS,
Cl'k.

And afterwards, to wit, on the 2d day of July, Ao. Do. 1852, the plaintiff filed in said cause the following affidavit, to wit:

WEBB
vs.
LEITENSDORFER.

This day comes into court James J. Webb; being duly sworn, saith that he cannot proceed with safety to trial at this term of the court, on account of not being able to obtain certain books and papers which are important for him in the trial of the above cause; that a subpœna duces tecum was issued for the said books and papers, and served upon Hugh N. Smith, in whose possession it was supposed the said books and papers were; that he is informed since that said books and papers are in the hands of Thomas Biggs, for whom also a subpœna duces tecum, but was returned, not found, as to said Biggs; that said plaintiff expects to be able to obtain the said books and papers by the next term of this court; that he has a meritorious cause of action; and that this application is not made for the purpose of vexation or delay, but that justice may be done.

(Signed) JAMES J. WEBB.

Sworn to and subscribed before me, this 2d day of July, Ao. Do. 1852.

(Signed) R. H. TOMPKINS,
Cl'k.

And afterwards, to wit, on the day and year last aforesaid, the following order was made by said district court, to wit:

JAMES J. WEBB
vs.
E. LEITENSDORFER & Co. } Attachment.

Upon the affidavit of the plaintiff, this cause is ordered to be continued till the next term of this court.

And afterwards, to wit, on the 1st day of October, Ao. Do. 1852, the following order was made, to wit:

JAMES J. WEBB
vs.
E. LEITENSDORFER & Co. } Attachment.

This day came the parties by their attorneys; and thereupon

came a jury, to wit, Wm. T. Dalton, Caleb Sherman, Joseph D. Ellis, Jas. Conway, O. W. Blanchard, James E. Corbit, George Jefts, Wm. Schwatka, James Gilchrist, Henry Rhue, James E. Owens, and Jose Gutierres, who, being empannelled and sworn the truth to speak upon the issue joined between the parties upon their oaths, do say that they find for the plaintiff; that the affidavit made in said cause is true. It is therefore considered that said cause do proceed, and that defendants plead to the merits.

And afterwards, to wit, on the 2d day of October, Ao. Do. 1852, the said defendants filed in said court, the following plea, to wit:

JAMES J. WEBB
vs.
E. LEITENSDORFER and
JOAB HOUGHTON.

And the said defendants, by their attorneys, come and defend the wrong and injury, and say that they did not undertake and promise in manner and form as is charged in said plaintiff's declaration.

(Signed) GARY & SMITH,
For Defendants.

And afterwards, to wit, on the day and year last aforesaid, the following motion and order was made by said court, to wit:

JAMES J. WEBB
vs.
E. LEITENSDORFER and
JOAB HOUGHTON.
Attachment.

This cause came on to be heard upon the following motion, to wit:

The defendants, by their counsel, move the court to set aside the verdict of the jury on the trial of the first issue on the affidavit in this cause, and grant a new trial, because the jury did not find according to the evidence in the cause, and the court erred in instructing the jury; and said motion being agreed to by the counsel, and the court being fully advised in the premises, it is ordered that said motion be overruled, and that said cause do proceed to the final issue. And thereupon come a jury, to wit, James E. Owens, Thomas Bowler, Benj. Cunningham, George Jefts, Samuel C. Harrison, Louis Dorrence, James Conway, John Reaves, Charles Dice, John Gormin, George Y. Withered, and Jose Gutierrez, who, being empannelled and sworn the truth to speak upon the issue joined between the parties, upon their oaths do say that they find for the plaintiff, and assess his damages to ten thousand three hundred and thirty dollars and twenty-five cents; therefore, it is considered by the court that the said plaintiff recover of the

said defendants, Eugene Leitensdorfer and Joab Houghton, the sum of ten thousand three hundred and thirty dollars and twenty-five cents for his damages assessed as aforesaid, and also his costs in this behalf expended, to be taxed.

And afterwards, to wit, on the day and year last aforesaid, the following motion and order was made by said court, to wit:

JAMES J. WEBB
vs.
E. LEITENSDORFER & Co. } Attachment.

This cause come on to be heard upon the following motion, to wit:

The counsel for defendants move the court to set aside the verdict in this cause, and grant a new trial, because the verdict of the jury is against the evidence; because the court misinstructed the jury on the trial of the first issue joined in this cause; because the court erred in instructing the jury on the trial of the first issue in this cause, and for other causes; which motion being understood by the court, it is ordered the same be overruled.

And afterwards, to wit, on the day and year last aforesaid, the following motion and order was made in said court, to wit:

JAMES J. WEBB
vs.
E. LEITENSDORFER & Co. } Attachment.

This cause come on to be heard upon the following motion, to wit:

The said defendants move the court to arrest the judgment in this cause, because the case was improperly placed upon the docket of this court; because this court has not had jurisdiction of this cause; because the judgment is for the wrong party, and for other causes. And the said motion being understood by the court, it is ordered, the same be overruled. To which opinion of the court, the said defendants excepted, and prayed an appeal to the Supreme Court, which appeal is by the court allowed, upon the said defendants executing bond for the costs of this court and the Supreme Court, to be approved of by the clerk, but not to operate as a supersedeas.

And afterwards, to wit, on the day and year last aforesaid, the following motion and order was made in said court, to wit:

JAMES J. WEBB
vs.
E. LEITENSDORFER & Co. } Attachment.

This cause come on to be heard upon the following motion, to wit:

The counsel for plaintiff moves the court to have the agreement between the parties in this cause placed upon the records of this court; and said motion being understood by the court, it is ordered said motion be sustained.

Articles of agreement.

In the Santa Fé circuit court, June T., 1849.

CAMPBELL
vs.
LEITENSDORFER & Co.

In the same court, to October term, 1849.

KELLY
vs.
SAME.

In the same court, to October T., 1849.

WEBB
vs.
SAME.

Attachment having been sued out of the circuit court in and for said county aforesaid, in favor of R. Campbell, in favor of Eugene Kelly, and one in favor of James J. Webb, and against said Leitensdorfer & Co., and there being a large stock of goods levied upon on the said attachments, and there being also a large number of debts due to and uncollected by said Leitensdorfer & Co., or by the assignees of said E. Leitensdorfer & Co., Thomas Biggs, and Hugh N. Smith, and it being deemed most advisable to collect the said debts, and to convert the said goods and effects of said Leitensdorfer & Co. into money, and no objection to such disposition being made on the part, either of the creditors aforesaid, or the aforesaid assignees, it is ordered and decreed by the court, with the consent of the creditors, and for the purpose aforesaid, that the said goods and effects, and accounts, be placed in the hands of Thomas Biggs, as a trustee, (he not waiving or losing any right as assignee,) for sale and collection, which he will proceed to execute with all reasonable dispatch regard being had to the interest, both of the assignees and the creditors of said Leitensdorfer & Co. It is further ordered that the said goods and effects be sold for cash, and the same shall be held by said trustee, subject to the order of the court that shall try the suits between E. Leitensdorfer & Co., and their creditors and assignees. It further ordered and decreed that the said Thomas Biggs, as trustee, shall, before entering on the discharge of his trust, give security in the sum of

twenty thousand dollars for the faithful performance of the conditions of this decree, and he shall receive the sum of ten per centum on the money arising from all sales or collections in full compensation for his services as trustee aforesaid; and he shall also be paid all necessary expenses in travel and in settling up the business, and in the disposition of the goods, or in the making of collections as aforesaid, and the salary and hire of a clerk to assist in the adjustment of the same. It is also ordered and decreed that a true and perfect inventory of all the goods and effects, and the debts due to said E. Leitensdorfer & Co., be taken immediately after entering on his duties as trustee, which shall, at all times, be subject to examination by the creditors of said E. Leitensdorfer & Co., the expenses of taking which shall be paid from the sales of the goods and effects aforesaid.

As counsels of plaintiffs and defendants, we consent that the foregoing be made an order and decree of the Santa Fé circuit court.

Santa Fé, August 5th, 1849.

(Signed) P. J. PILLANS,
Att'y for Kelly.
R. H. WEIGHTMAN,
Att'y for Campbell & Webb.
ANGNY, H. N. SMITH, & QUINN,
Att'ys for Defendants.

Accompanying bond.

Know all men by these presents, that we, Thomas Biggs, as principal, H. N. Smith, Isaac McCarty, Oran St. Vrain, George H. Peacock, and R. T. Brent, as securities, are held and firmly bound unto the Territory of New Mexico in the sum of twenty thousand dollars; to which payment, well and truly to be made, we bind ourselves, or executors, firmly by these presents; sealed with our seals, and dated this 6th day of August, Ao. Do. 1849.

The condition of the above obligation is such, that whereas suits by attachment have been commenced in the Santa Fé circuit court by R. Campbell, Eugene Kelly & Co., and James J. Webb, against E. Leitensdorfer & Co., and a certain lot of goods attached, in the hands of H. N. Smith and Thomas Biggs, as assignees of E. Leitensdorfer & Co., which said goods, by order of the judge of the Santa Fé circuit court, made this day, have been placed in the hands of Thomas Biggs, as trustee, to sell as perishable property; and whereas said decree orders that said Biggs shall sell said goods for cash, and collect the outstanding debts due to E. Leitensdorfer & Co., and account for said proceeds, subject to the order of the court which shall try the suits between E. Leitensdorfer & Co., their assignees and creditors: Now, if said Biggs shall abide by and perform the order and decree of the judge of the Santa Fé

circuit court, and shall have the proceeds of said sales and collections, subject to the order of the court which shall try said suits between E. Leitensdorfer & Co. and their creditors, then, and in that event, this obligation shall be null and void; otherwise, it shall remain in full force and virtue. And it is further agreed that this bond may be sued on in the name of the territory, to the use of any party or person aggrieved by the failure to comply with the conditions herein contained.

	THOMAS BIGGS,	[SEAL.]
	HUGH N. SMITH,	[SEAL.]
(Signed)	ISAAC McCARTY,	[SEAL.]
	ORAN ST. VRAIN,	[SEAL.]
	R. T. BRENT,	[SEAL.]
	G. H. PEACOCK,	[SEAL.]

And afterwards, to wit, on the 2d day of October, Ao. Do. 1852, the following order was made by said court, to wit:

JAMES J. WEBB
vs. } Attachment.
E. LEITENSDORFER & Co.

This cause come on to be heard upon the following motion, to wit:

And now comes the plaintiff, and moves the court for a rule of court on Thomas Biggs, trustee, to pay into this court on the first day of their next term the proceeds derived by him from the sale of goods and effects attached at the suit by attachment of Robert Campbell vs. E. Leitensdorfer & Co., and of James J. Webb vs. Same, and of Eugene Kelly vs. Same, and placed in his hands as trustee, under order of the circuit court of the county of Santa Fé, October term, Ao. Do. 1849, and account for all proceeds that have come into his hands as said trustee, or show cause to the contrary; and said motion being fully understood by the court, it is therefore ordered that on or before the first day of the next term of this court, Thomas Biggs pay into court all the money received by him as trustee, for the sale of goods, wares, and merchandise levied upon by said attachment suits, and also all money collected by him as said trustee, together with the returns of said sale, or that he then and there show cause to the contrary, and that a copy of this order be served upon him thirty days before the first day of the next term of this court.

Bill of exceptions, No. 1.

Attachment in the late circuit court of the Santa Fé county, Territory of New Mexico.

EUGENE LEITENSDORFER,
JOAB HOUGHTON
ads.
JAMES J. WEBB.

Now, at this 19th day of September, Ao. Do. 1851, the said

plaintiff, James J. Webb, by his attorney, comes here into this district court of the United States, for the first district of the Territory of New Mexico, and moves the court as follows, to wit:

JAMES J. WEBB
vs.
E. LEITENSDORFER.

The plaintiff, by his counsel, moves the court to file the papers in the above cause in this county, and that the same may be made a part of the records and papers of this court.

(Signed) ASHURST & TULY,
For motion.

To which motion, and to the court sustaining the same, the attorneys of said defendants, being in this court, objected; but this court overruled their said objection, and sustained said motion, and ordered that said cause be docketed in this court as a cause pending in this court, to which opinion and decision of the court in overruling said objection, and in sustaining said motion, and in ordering said cause to be docketed in this court as a cause pending in this court, the said defendants, by their attorneys, except, and pray this their bill of exceptions be signed and sealed, and made a part of the record in said cause, which is accordingly done, this 20th day of September, Ao. Do. 1851.

(Signed) GRAFTON BAKER, [SEAL.]
Ch. Justice Sup. Court U. S., Territory N. Mexico.

Bill of exceptions, No. 2.

IN DISTRICT COURT,
Santa Fé county.

EUGENE LEITENSDORFER &
JOAB HOUGHTON,
ads.
JAMES J. WEBB.

Be it remembered, that on this 2d day of October, Ao. Do. 1852, this said defendant presented to the court their motion to set aside the verdict of the jury upon the trial of the first issue on the affidavit of the plaintiff in this cause, and to grant a new trial, which motion is as follows, to wit: The defendants, by their counsel, move the court to set aside the verdict of the jury, on the trial of the first issue, on the affidavit in the cause, and grant a new trial, because the jury did not find according to the evidence in the cause; and because the court erred in instructing the jury; which motion the court overruled, and refused to set aside said verdict and grant such new trial; to which opinion and decision of the court, in over-

ruling said motion, and in refusing to set aside said verdict and grant such new trial, the said defendants except, and pray that this their bill of exceptions may be signed, sealed, and enrolled by the court, and made a part of the record in this cause; which is accordingly done, this 2d day of October, Ao. Do. 1852.

(Signed) GRAFTON BAKER, [SEAL.]
Ch. Justice and presiding.

Bill of exceptions, No. 3d.

EUGENE LEITENSDORFER &
JOAB HOUGHTON,
ads.
JAMES J. WEBB.

Be it remembered, that on this 3d day of October, Ao. Do. 1852, the said defendants presented to said court their motion to set aside the verdict of the jury on the last issue joined in this cause, and grant a new trial, which motion is as follows, to wit: The counsel for defendants move the court to set aside the verdict in this cause, and grant a new trial, because the verdict of the jury is against the evidence; because the court misinstructed the jury on the trial of the first issue joined in this cause; because the court erred in instructing the jury on the trial of the first issue in the cause, and for these causes; which motion the court overruled, and refused to set aside said verdict, and grant such new trial, to which opinion and decision of the court in overruling said motion, and in refusing to set aside said verdict and grant such new trial, the said defendants except and pray that this their bill of exceptions be signed, and sealed, and enrolled by the court, and made a part of the record in this court; which is accordingly done, this 2d day of October, Ao. Do. 1852.

(Signed) GRAFTON BAKER, [SEAL.]
Ch. Justice presiding.

Bill of exceptions, No. 4.

IN THE DISTRICT COURT,
Santa Fé County.

EUGENE LEITENSDORFER &
JOAB HOUGHTON,
ads.
JAMES J. WEBB.

Be it remembered, that on this 2d day of October, Ao. Do. 1852, the said defendants presented to said court their motion to arrest the judgment in this cause, which motion is as follows, to wit: The

said defendants move the court to arrest the judgment in this cause, because the case was improperly placed upon the docket of this court; because this court has not and has not had jurisdiction of this cause; because the judgment is for the wrong party and for other causes; which motion was by the court overruled, and the court refused to arrest said judgment, to which opinion and decision of the court, in overruling said motion, and in refusing to arrest said judgment, the said defendants except, and pray that this his bill of exceptions be signed, sealed, and enrolled by the court, and made a part of the record in this cause; which is accordingly done, this 2d day of October, Ao. Do. 1852.

(Signed) GRAFTON BAKER, [SEAL.]
Ch. Justice, &c., presiding.

Bill of Exceptions No. 5.

EUGENE LEITENSDORFER and JOAR HOUGHTON ads. JAMES J. WEBB.

Be it remembered, that on the trial of the issue made upon the defendants' answer to the plaintiff's affidavit in this cause, putting in issue the truth of said affidavit in the above-entitled cause, on the 1st day of October, Ao. Do. 1852, the said plaintiff introduced as a witness Thomas Biggs, who being sworn, testified that he was clerk for defendants, from time to time, from 1845 to 1848. Plaintiff introduced the following instrument:

"This indenture, made and entered into this eleventh day of December, in the year of our Lord one thousand eight hundred and forty-eight, by and between Eugene Leitensdorfer, of the first part, and Hugh M. Smith and Thomas Biggs, of the second part, all of the county of Santa Fé, and Territory of New Mexico, witnesseth, that whereas Eugene Leitensdorfor, as a partner in the late firm of E. Leitensdorfer & Company, is largely indebted, and whereas he wishes to secure his creditors, as far as his effects will extend, or can be made to extend, he, the said Eugene Leitensdorfer, the party of the first part, has this day assigned, conveyed, and transferred, all and singular, his goods, wares, and merchandise, and all his property and effects of the late firm E. Leitensdorfer & Company, unto Hugh M. Smith and Thomas Biggs, the parties of the second part, to have and to hold the same upon the conditions hereinafter mentioned, for the use and benefit of the creditors of Eugene Leitensdorfer; and the said Hugh M. Smith and Thomas Biggs undertake, promise, and bind themselves to sell and dispose of the property so assigned to them, and to receive and collect all the property, accounts, debts, and moneys due the said Eugene Leitensdorfer, and due the late firm of Eugene Leitensdorfer & Company, as far as it is in

their power to collect the same, and to dispose of the proceeds or money arising from said sales and collections for the use and benefit of the use of the creditors of E. Leitensdorfer & Company, and of Eugene Leitensdorfer, in the following manner, that is to say: First, the clerks and agents now serving in the storehouse of E. Leitensdorfer, in the city of Santa Fé, are to be paid their wages and all arrearages due them; then, after paying the actual current expenses of conducting the business assigned to said Smith and Biggs, they, the said Smith and Biggs, are to pay, as fast as the assets are collected or converted into money, all the annexed debts, as being those placed in the list of preferred creditors: For money borrowed or deposited, or such as Eugene Leitensdorfer may have considered himself more especially bound to pay, which are the following: To Lewis & Courtney, nineteen thousand nine hundred and ninety-four $\frac{12}{100}$; Modie and Simpson, seventeen hundred and forty-five $\frac{50}{100}$ dollars; to A. La Raux, four hundred and sixty-two $\frac{33}{100}$ dollars; and to Henry O'Niel, fourteen hundred and fifty dollars, and all other sums of money due by E. Leitensdorfer & Company for simple deposits, or money loaned without interest. And after which payments of preferred creditors, with all assets collected, they, the said Smith and Biggs, are to pay all the other creditors, pro rata, until the assets are expended. But it is expressly understood and agreed that the said Smith and Biggs are to settle up, manage, and conduct the said business so assigned to them, and to sell and dispose of all the property assigned to them as to them shall seem best for the interest of all the creditors; and that they, the said Smith and Biggs, are to be paid for their labor, diligence, and attention to said business, a fair and reasonable compensation from time to time; and the said Smith and Biggs agree to have made out and annexed, within ten days after the signing of this indenture, a fair and correct list of the liabilities of E. Leitensdorfer & Company; and also a fair and correct list as far as can be made of all the assets which they can control, and to keep a correct set of books exhibiting the condition of the business assigned to them, until the assets are all expended as before mentioned; and the said Smith and Biggs are hereby empowered and authorized to sue for and collect all debts or sums of money due the firm of E Leitensdorfer & Company, and E. Leitensdorfer, in their own names as assignees; and to collect and keep all the books, paper, and accounts which may be necessary to settle the business of the firm of E. Leitensdorfer and Company; and it is further understood and agreed, that in case of the death of either of the said assignees, Smith or Biggs, or in case either should renounce the trust and assignment hereby confided to them, the same power and authority are hereby continued and granted to the survivor or remaining one of the assignees.

In testimony whereof we have hereunto set our hands and seals

this 11th day of December, one thousand eight hundered and forty-eight.

(Signed) E. LEITENSDORFER, [SEAL.]
HUGH N. SMITH, [SEAL.]
THOS. BIGGS, [SEAL.]

Signed, sealed, and delivered in the presence of—
(Signed) CERAN ST. VRAIN,
CHARLES BLUMNER.

Know all men by these presents, that I, Joab Houghton, do hereby authorize and empower Hugh N. Smith and Thomas Biggs, as assignees of Eugene Leitensdorfer and Company, to use my name, and to sign my name in any way that it may be necessary for them to use it in settling the business of the late firm of E. Leitensdofer and Company.

Given under my hand and seal, this 11th day of December, Ao. Do. 1848.

(Signed) J. HOUGHTON, [SEAL.]

Witness—
(Signed) CERAN ST. VRAIN.

Said witness testified that said instrument was executed by said defendant at the time in the same stated; that the assets by the same assigned amounted to about thirty-two thousand dollars. An inventory of the assets was made out immediately after the assignment, perhaps four or five days; a rancho of Leitensdorfer was turned over to assignees, but they have never been able to sell it. Some cattle on hand at the time of assignment had more expense on them in the hand of the herder than they were worth.

Before the assignment, defendant, Leitensdorfer, and witness went to El Paso, with goods and outfit of said Leitensdorfer; from thence, witness went on with the goods to Chihuahua. In Chihuahua, El Paso, and Rio Abajo, witness paid out of the proceeds of said goods about $51,000 00 on orders of the defendants. Witness paid $32,000 00 of said $51,000, to Dr. Connelly, $15,000 of which was for money loaned to defendants by him, and the balance for personal services and goods sold. All this was before the assignment.

After the assignment, Leitensdorfer lived in Santa Fé, El Paso, and the United States; was engaged in no business while in Santa Fé. Witness loaned Leitensdorfer $1,600 00 in January, 1849, which was repaid in 1850; also loaned Houghton, after the assignment, $700, which has not been repaid.

Leitensdorfer lived in Santa Fé one or two months after the assignment. Got some $8 to $12 goods from the store after the assignment, which he paid before going away. Houghton also got a small amount of goods from the store, which witness paid himself.

Leitensdorfer turned over no property in the States to assignees. Witness knows of no property of Leitensdorfer in the States. Witness does not recollect amounts paid to Lewis and Courtney, Modee & Simpson, A. La Raux, or Henry O'Neil, but the receipt show O'Neal was paid $400. Some persons, whose names are not in the deed of assignment, who had money deposited with or loaned without interest to defendants, have been paid by the assignees. Defendants owed witness $2,329 $\frac{38}{100}$ for services as clerk and money loaned. Loaned defendants $900 to $1,000 in St. Louis; he has been paid. Smith, the other assignee, had ac. against defendants for services as attorney-at-law and for money deposited. As assignee and attorney for assignees, his ac. was $1,000; he was paid. Two teamsters were paid about $50—one of them partly for services for the assignees after the assignment. Manuel Chanes had a contract with defendants before assignment to herd cattle; the herding came to more than the value of the cattle, and a balance was paid to him. Lewis and Courtney's debt was for money loaned and advanced to defendants to make their outfit, to bring the goods across the plains, in 1848, at ten per cent. Does not know that Leitensdorfer drew on them.

The outfit was sent back from El Paso, and was sold by attaching creditors in Independence, as witness understood. Were sent back before assignment. Don't know of Leitensdorfer or Houghton collecting any money due defendants after the assignment. Turned over none except some $50 in the house at the time of assignment. Never saw the note sued on before it is now shown to him.

On cross-examination.

The inventory was made by V. St. Vrain, Jesus Abren, Richard McKinney, and witness. McKinney was clerk before and for a short time after the assignment. The list of the liabilities of defendants is by McKinney; it amounts to $105,944 04, and is as follows, and was introduced and referred to, to show the amount of the liabilities of defendants:

The cattle of Leitensdorfer did not pay the keeping. The money loaned by witness to Leitensdorfer and Houghton after the assignment was the witness' own money. Notice of the assignment was published in the newspaper when made. Houghton and Leitensdorfer were both refused credit, in the store, after the assignment. There were several agents and the clerks in the store before assignment, and many depositors of money, and debts due for money loaned without interest, not named in the deed of assignment. Assignees paid out to creditors twenty thousand and odd hundreds dollars. Paid preferred creditors pro rata as money was collected. Witness had been a partner of defendants in a business which was closed before assignment.

The cause of the assignment was, that creditors whom defendants were unable to pay were pressing them. Assignees paid no creditors out of the fund of the assignment but agents, clerks, depositors, and persons named in the deed. In Chihuahua witness paid freight bill from El Paso to Chihuahua, and also for smuggling the goods into Chihuahua.

Assignees collected all the property of defendants they could find; more than defendants expected would be collected. They never employed the defendants as agents after the assignment. Deposits were made with defendants by persons from all parts of the Territory. Their credit was undoubted. Lewis & Courtney had a note and ac. to the amount stated in the deed. It is customary to pay 10 per cent. for advances for outfits. $19,000 is not a large amount for outfits of forty wagons, which defendants brought out. The wagons and teams were transferred to creditors before starting to the States, in August, 1848. Were attached in the States. Assignees never had anything to do with them.

Direct examination resumed.

Don't know how long any acceptances of Lewis & Courtney had to run. Books of defendants showed some $75,000 due them, but one settlement, only some $3,000 or $4,000, was collected. Debloss had offsets, receipt, &c., and assignees could not prove the accounts. Several persons were sued by assignees on ac. Defendants had no goods of any amount on hand before the wagons arrived. The 40 wagons of goods, at first cost, outfit and all, would cost $80,000 to 90,000. Goods arrived in June or July, 1848; assignment was two or three weeks after. Witness return from Chihuahua $31,990 of the goods from the States were sent to Chihuahua. Suits were instituted by assignees against all that it was thought expedient.

Hugh N. Smith was then introduced by the plaintiff, and being sworn, testified that he was one of the assignees. The inventory of the property was made immediatety after the assignment, or in a few days. Was acquainted (with) the house of the defendants. Was in the States when the goods arrived. Defendants did the largest business in the Territory. Don't know what the orders of defendants on Biggs, in Chihuahua, were for. Knew of the $32,000 transaction with Connelly—$15,000 borrowed money. Don't know what the defendants borrowed the $15,000 for. Several of the creditors of defendants in the States came out, or sent out clerks in the summer of 1848. Don't know that this is usual. Lewis & Courtney made outfit for defendants. Leitensdorfer had difficulty in getting outfit. Don't know how long acceptances of Lewis & Courtney had to run—thinks they were cash. Knows many of the men to whom acceptances were given—were cattle raisers. Lewis & Courtney were paying out money for defendants. Witness was

attorney for Lewis & Courtney, and Modie & Simpson. La Raux and O'Niel had notice; depositors and agents generally had notice. Some small deposits were paid in full—clerks and agent were paid in full. Thinks it was Houghton and Folger and not defendants that owned the Oteros. O'Niel was paid $400. Lewis & Courtney about $8,000; they stand on a par with O'Niel.

On cross-examination.

Assignment was made because creditors were urging payment. Witness threatened to sue for Lewis & Courtney, but agreed to wait the return of the Chihuahua adventure.

Witness had Lewis & Courtney, Modie & Simpson, and some other small debts to collect—thinks he had O'Niel's. Defendants were doing an extensive credit business, which was then loosely done in this Territory. There was no money in the hands of the assignees at the commencement of this suit. The goods on hand at the time of the commencement of this suit, after being some time in sheriff's hands, were placed in Biggs' hands, to hold the proceeds to abide the event of the suits. Over $22,000 were paid out by assignees. Witness deposited his own and client's money in the house of defendants.

Direct examination resumed.

Witness threatened to attach defendants' property, because they had taken goods to Chihuahua—before its return—had returned when assignment was made; Chihuahua expedition had gone when witness received Lewis & Courtney's claim. Got the claim from Waldo. Witness went to the States in April, and returned in September; perhaps October. Don't know the amount of goods brought out by defendants—understood $89,944,04, from the list of liabilities made out immediately after the assignment. Leitensdorfer stated the same terms to witness at the time of the assignment, which are in the deed.

Lewis and Courtney, and Modie and Simpson, were preferred because they assisted defendants in Independence when in difficulty; others because it was money loaned without interest. An insertion in different ink in the deed, the witness thinks, must have been made before signing. There was no compulsion or coercion of Leitensdorfer to compel him to make the assignment. No threats were made of anything further than legal measures to collect the debts. The deed of assignment was written out to be submitted to some other parties before signing some little time before its execution.

Charles Blumner being introduced by the plaintiff as a witness and sworn, testified: Does not know the amount of goods brought out by defendants; 1848 was one of the best years for business in Santa Fé; was not himself in business.

On cross-examination.

A good many merchants failed that year; the market was overstocked with goods. William Mitchell being introduced by the plaintiff as a witness, and sworn, testified that he was in Independence in 1848, about the time of Lewis and Courtney's debt; was for out-fit; knows nothing of acceptances. Leitensdorfer told him nothing. 1848 was a bad year for most of the merchants. Several failed in 1848, and spring of 1849. The latter failures were caused by the bad business of 1848. Was himself in business in Santa Fé.

The foregoing was all the evidence offered in the cause. The defendants thereupon moved, 1st, the court to instruct the jury, as the assignment was the act of Leitensdorfer alone, with which Houghton had nothing to do, the act of one defendant would not authorize an attachment against two, and the verdict must be for the defendants.

2d. Also, that the deed of assignment was not fraudulent in law, and unless the jury find from the evidence, that in fact, at the time of the commencement of this suit, the plaintiff had good reason to believe that the defendants had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, they must find for the defendants.

3. Also, that as the plaintiff had shown no title to the note sued on himself, he had no authority to sue, and the jury must find for the defendants.

4. Also, that if the assignees of the defendants had erred in paying off any of the creditors of the defendants, no advantage could be taken of that matter in this suit, but it could only be complained of by the party prejudiced thereby in a suit against the assignees.

And the court refused to give the said first, second, and third instructions to the jury, and gave the said fourth instruction. And also instructed the jury that said deed was fraudulent in law, because of the want of a schedule thereto annexed by the assignees of the property and effects conveyed to them by the defendants; and because of the want of a schedule thereto annexed of the preferred creditors; and because of the preference given to some creditors by said deed. Also, that if the jury found that the defendants, or either of them, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, at the time of the commencement of this suit, they must find for the plaintiff. That the execution of said deed of assignment by Leitensdorfer, unaccompanied by proper schedules, was such a fraudulent disposition in law, as aforesaid, and that the commission of a fraud in law by the defendants, or either of them, without any fraud in fact, or without any intent to defraud, was as sufficient cause for attachment as the commission of a fraud in fact, or with

intent to defraud. Also, that on the trial of this issue it was not necessary for the plaintiff to show himself a creditor of the defendants further than is shown in the affidavit to entitle him to a verdict in his favor, upon the issue of the truth of the affidavit; but that the sole issue was whether the defendants, or either of them, at the time of the commencement of this suit, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors. To all of which said instructions so given, as aforesaid, by the court to the jury, except the said fourth instruction, prayed for by the defendants, the said defendants objected; but the court overruled their objections, and gave said instruction as aforesaid, to all which opinions and decisions of the court, both in refusing to give to the jury the said first, second, and third instructions, prayed for by the said defendants, and also in giving to the jury said instruction which was objected to as aforesaid by said defendants—

The said defendants except, and pray that *that* this their bill of exceptions may be signed, sealed, and enrolled by the court, and made a part of the record in this cause, which is accordingly done this 2d day of October, Ao. Do. 1852.

(Signed) GRAFTON BAKER, [SEAL.]
Chi. Justice and presiding.

And afterwards, to wit, on the 2d day of October, Ao. Do. 1852, the said defendants filed in said district court, the following affidavit, to wit:

Appeal to the Supreme Court.

TERRITORY OF NEW MEXICO, COUNTY OF SANTA FE,
In the first District Court for the Territory of New Mexico.

JAMES J. WEBB
vs.
E. LEITENSDORFER and
JOAB HOUGHTON.

This affiant, Hugh N. Smith, agent in this suit for the defendants, makes oath, and says that this appeal from the judgment of the district court aforesaid in this cause, is not taken for the purpose of vexation or delay, but because this affiant believes that the appellants are aggrieved by the judgment of the district court in this case.

(Signed) HUGH N. SMITH.

Sworn to and subscribed before me, this 2d day of October, Ao. Do. 1852.

(Signed) R. H. TOMPKINS,
Clk.

And afterwards, to wit, on the 21st day of December, Ao. Do. 1852, the said defendants filed in said district court the following bond, to wit:

Know all men by these presents, that we, Joab Houghton, as principal, and William C. Mitchell and James L. Collins, as securities, are held and firmly bound unto James J. Webb, in the sum of one hundred and fifty dollars, to which payment, well and truly to be made, we bind ourselves, our heirs, and executors, firmly by these presents. Sealed with our seals, and dated this 21st day of December, Ao. Do. 1852.

The condition of the above bond is such, that whereas Eugene Leitensdorfer and Joab Houghton have appealed from a decision or judgment of the district court for Santa Fé county, rendered at the September term of said court, wherein James J. Webb was plaintiff, and the said Leitensdorfer and Houghton, were defendants: Now, if the said Leitensdorfer aud Houghton, shall well truly pay all the costs which have accrued or may hereafter accrue in said cause, either in the district court or in the Supreme Court of the Territory, then this bond shall be null and void; otherwise it shall remain full force and virtue.

(Signed) J. HOUGHTON, [SEAL.]
WM. C. MITCHELL, [SEAL.]
J. L. COLLINS, [SEAL.]

I hereby approve the penalty and sureties in this bond, Dec. 21st, 1852.

(Signed) R. H. TOMPKINS, *Cl'k.*

The costs taxed in this case in the district court, and old circuit court, are as follows:

Clerk's costs.

Giddings	$5 75	
Sherman	1 00	
Tompkins	17 25	
This transcript	18 25	
	$35 50	
		$42 25

Sheriff's and Marshal's costs.

Merrit	$8 00	
Jones	30 00	
		38 00
		$80 25

UNITED STATES OF AMERICA,
Territory of New Mexico, County of Santa Fé.

I, Rich'd H. Tompkins, clerk of the United States district court

for said county, do hereby certify that the foregoing fifty pages contain a complete transcript of all the papers, pleadings, journal, entries, judgment, and other orders of said court, in the case of James J. Webb, against Eugene Leitensdorfer and Joab Houghton, as the same remains of record in my office; and that this transcript has been correctly copied therefrom.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 22d day of December, Ao. Do. 1852.

(Signed) RICH'D H. TOMPKINS,
Clk.

Supreme Court, January term, 1853.

In addition to the foregoing, the following is a perfect and a complete transcript, of the docket entries and other proceedings had in the said cause while pending in the supreme court of the Territory of New Mexico, as follows to wit:

Supreme Court, January term, 1853, first day.

EUGENE LEITENSDORFER and JOAB HOUGHTON vs. JAMES J. WEBB. } Error from Santa Fé county, first district court.

Now come the plaintiffs in error, by Messrs. Wheaton and Smith, their attorneys, and file the assignment of errors herein, in the following words and figures, to wit:

On appeal from the first judicial district, county of Santa Fé, supreme court of the Territory of New Mexico.

EUGENE LEITENSDORFER and others, appellants, vs. JAMES J. WEBB, appellee.

Assignment of errors by appellants: the district court erred—

1st. The district court erred in placing the said cause upon its docket.

2d. The district court erred in overruling the motion to set aside the verdict in the first issue in said cause.

2. The court erred in overruling instructions asked by defendants.

3d. The court erred in refusing to grant a new trial on the first issue.

4th. The court erred in giving instructions asked by plaintiff.

5. The court erred in overruling the motion on arrest of judgment.

6th. The district court erred in giving judgment for the plaintiff, when, from the facts and the law, the judgment of said court should have been in favor of the defendants, and against said plaintiffs.

5 (7.) The district (court) erred in overruling the motion for a new trial.

(Signed) WHEATON & SMITH,
For Appellants.

Joinder in errors by appellants.

LEITENSDORFER et als.
vs.
JAMES J. WEBB.

Appellees joined issue, and say that there is no error in the record of the said cause.

(Signed) ASHURST & TULY.

Supreme Court, January term, 1853, 2 day.

EUGENE LEITENSDORFER and JOAB HOUGHTON
vs.
JAMES J. WEBB.
} Error to Santa Fé county, 1st district.

Now comes the defendant in error, by Messrs. Ashurst and Tuly, his att'ys, and file the rejoinder in error herein; and this cause being now at issue, is continued until to-morrow morning for further proceeding herein.

And afterwards, to wit, on the 18th day of January, Ao. Do. 1853, the following order was made, on motion of appellants, for continuance.

EUGENE LITENSDORFER and JOAB HOUGHTON
vs.
JAMES J. WEBB.
} Santa Fé county, first district.

Now come the appellants, by Messrs. Quinn, Smith, and Wheaton, and file a motion herein for the continuance of this cause, and after hearing the arguments of counsel upon said motion, the court, not being sufficiently advised in the premises, continue said motion under advisement, until four o'clock this afternoon.

And afterwards, to wit, on the day and year last aforesaid, the following order was made, to wit:

EUGENE LEITENSDORFER and
JOAB HOUGHTON
vs.
JAMES J. WEBB.

Error to Santa Fé county, first district.

The court on being sufficiently advised upon the motion, Mr. Watts, associate justice, delivered the opinion of the court, as follows:

"A motion is made in this case by appellants to continue this cause upon the ground that the district judge, who tried said cause, cannot by the laws of the United States, give a vote in any case of appeal or error from his own decision; and hence no decision of this case can now be given by the court as at present constituted, from the fact that but one judge other than the district judge who decided this case is now present. The authority relied upon in support of this motion is a proviso in the 4th section of an act to establish the judicial courts of the United States, approved September 24th, 1789. An act of Congress amendatory of the judicial system of the United States generally, was passed the 29th of April, 1802, which repealed the above-quoted act of September 24th, 1789. Now, in the act of the 29th of April, 1802, there is no such proviso as is contained in the 4th section of the act of September 24th, 1789, and hence the present motion is without authority to sustain it, and must be overruled. It is therefore considered by the court, that the motion for a continuance in this cause be overruled. And afterwards, to wit, on the nineteenth day of February, Ao. Do. 1853, the following order was made in said cause:

EUGENE LEITENSDORFER and
JOAB HOUGHTON
vs.
JAMES J. WEBB.

Error to the Santa Fé county, first district.

This case being now ready for a hearing, the argument thereof is commenced by Mr. Wheaton, on the part of the plaintiffs in error, and after some time spent in the argument of said cause, it is ordered that court adjourn until this afternoon, at 2 o'clock.

And afterwards, to wit, on the same day and year last aforesaid, the following order was made in said cause, to wit:

EUGENE LEITENSDORFER and
JOAB HOUGHTON
vs.
JAMES J. WEBB.

Error to Santa Fé county, first district.

Mr. Wheaton now resumes and concludes his argument in this case, and the cause is now continued until to-morrow morning for further proceedings herein.

EUGENE LEITENSDORFER and
JOAB HOUGHTON
vs.
JAMES J. WEBB.

Error to the Santa Fé county, first district.

The argument of this case upon the part of the defendant in error is now commenced by Mr. Ashurst, and after some time spent in the argument of said case, it is now ordered that court adjourn until two o'clock this afternoon.

And afterwards, to wit, on the day and year last aforesaid, the following order was made, to wit:

EUGENE LEITENSDORFER and
JOAB HOUGHTON
vs.
JAMES J. WEBB.

Error to the Santa Fé county, first district.

The argument in this case is now concluded upon the part of the defendant in error by Mr. Ashurst, and upon the part of the plaintiffs in error by Mr. Smith, and this cause, for further proceedings herein, is continued until to-morrow morning.

And afterwards, to wit, on the 22d day of January, Ao. Do. 1853, the following order was made in said cause:

EUGENE LEITENSDORFER and
JOAB HOUGHTON
vs
JAMES J. WEBB.

Error to the Santa Fé county, first district.

This cause being now fully argued by counsel, is submitted to the court for final decision herein, and the court not being sufficiently advised in the premises, this cause is continued under advisement by the court.

And afterwards, to wit, on the 28th day of February, Ao. Do. 1853, the following order was made in the said cause:

EUGENE LEITENSDORFER and
JOAB HOUGTON
vs.
JAMES J. WEBB.

Error to Santa Fé county, first district.

The court now being sufficiently advised in the premises, the following opinion is given herein by Chief Justice Baker, to wit:

(Copied in record of orders and opinions. Page .)

Watts, associate justice, dissenting, delivered the following opinion, to wit:

(Copied in record of orders and opinions. Page .)

Opinion of the court.

E. LEITENSDORFER
vs.
JAMES J. WEBB.
} Attachment.

This case came before us by appeal from the district court of the first judicial district.

On the 30th June, 1849, the appellee, J. J. Webb, filed in the office of the clerk of the circuit court of Santa Fé county his petition, in the usual form, his affidavit and bond, and sued out a writ of attachment against the lands and tenements, goods and chattels, moneys, effects, and credits of Eugene Leitensdorfer and Joab Houghton, as partners, under the name and style of E. Leitensdorfer & Co., to recover the sum of eight thousand two hundred and ninety-seven and $\frac{92}{100}$ dollars, the amount of a promissory note made by said firm, at St. Louis, March 1st, 1848, payable to order of Doane, King & Co., of that place, and by them endorsed to the appellee. The writ of attachment was returned to the October term of the circuit court, "levied on all the goods, wares, merchandise, books, and credits, in the store of E. Leitensdorfer & Co., and now in the possession of C. H. Merritt, sheriff, as per invoice," &c.

At the October term, 1849, the appellants appeared, and filed their demurrer to the petition, which appear to have been the only step taken in the pleadings in the case, in the circuit court.

At the September term, 1851, of the U. S. district court for the first judicial district, the appellee entered his motion for leave to file the papers of the case in the district court; and that the case be entered on the docket and considered a part of the records of that court, which motion was sustained.

At the March term, 1852, the appellants filed their plea under the statute, putting in issue the truth of the affidavit upon which the writ of attachment issued; and at the following term a trial of this issue was had, and a verdict was found for the appellee.

Upon the trial, the appellee introduced as evidence a paper purporting to be a deed of assignment from E. Leitensdorfer to H. R. Smith and Thomas Biggs, of all and singular the goods, wares, and merchandise of said E. Leitensdorfer, and of all the property and effects of the late firm of E. Leitensdorfer & Co., for the purpose of paying the creditors of Eugene Leitensdorfer and of E. Leitensdorfer & Co. This deed bears date, the 11th of December, 1848; is signed by E. Leitensdorfer, and by said Smith and Biggs; and after reciting that "said Leitensdorfer, as a partner in the late firm of E. Leitensdorfer & Co. is largely indebted," and that "he wishes to secure his creditors as far as his effects will extend," proceeds, "he, the said Eugene Leitensdorfer, party of the first part, has this day assigned, &c., his goods, wares, and merchandise, and all his property and effects of the late firm of E. Leitensdorfer," & Co., unto H. N. Smith and Thomas Biggs, parties of the second part, for the use and benefit of the creditors of E. Leitensdorfer," &c. The assignees bind themselves "to sell and dispose of the property so assigned to them, and to receive and collect all the property, accounts, and debts due the said Eugene Leitensdorfer, and due the late firm of E. Leitensdorfer & Co., and to dispose of the proceeds for the use and benefit of the creditors of E. Leitensdorfer & Co., and of Eugene Leitensdorfer, in the following manner, that is to say: 1st. The clerks and agents now serving in the store-house of Eugene Leitensdorfer, are to be paid their wages and and all arrearages due them; then, after paying the actual current expenses of conducting the business assigned, &c., they, the said Smith & Biggs, are to pay, as the assets are collected or converted into money, all the annexed debts, as being those placed in the list of preferred creditors, for money borrowed or deposited, or such as Eugene Leitensdorfer may have considered himself more especially bound to pay, which are the following: To Lewis and Courtney, nineteen thousand nine hundred and ninety four $\frac{12}{100}$ dollars; Moodie and Simpson, seventeen hundred and forty-five $\frac{50}{100}$ dollars; to A. La Raux, four hundred and sixty-two $\frac{33}{100}$ dollars, and to Henry O'Neil, fourteen hundred and fifty dollars, and all other sums of money due by E. Leitensdorfer & Co., for simple deposits, or money loaned without interest. And after which payment of preferred creditors, with all assets collected, they, the said Smith & Biggs, are to pay all the other creditors, pro rata, until the assets are expended."

This assignment was ratified by said Joab Houghton, as appears by the following writing at the foot thereof, viz:

"Know all men by these presents, that I, Joab Houghton, do hereby authorize empower Hugh N. Smith and Thomas Biggs, as assignees of Eugene Leitensdorfer & Co., to use my name, and to sign my name in any way that it may be necessary for them to use it, in settling up the business of the late firm of E. Leitensdorfer and Company.

"Given under my hand seal, this 11th day of December, A. D. 1848."

(Signed) JOAB HOUGHTON, [SEAL.]

No schedule of the assets assigned or of the creditors was annexed to the deed of assignment.

Thomas Biggs, one of the assignees, proved that the assets assigned amounted to about $32,000; that some four or five days after the assignment, an inventory of assets made out; a rancho of Leitensdorfer was turned over to the assignees, but they had been unable to sell it. Some cattle of Lietensdorfer on hand at the time were sold for less than the expense of keeping them, so that a balance had to be paid. Before the assignment, Leitensdorfer sent to Chihuahua a considerable amount of merchandise; that of the proceeds thereof, he, Biggs, paid out upon orders of appellants, about $51,000.

A short time prior to this transaction, the appellants had brought from the States merchandise to the amount of between $80,000 and $90,000. (Smith states it at $89,944 64,) besides an outfit, in the way of wagons and teams, estimated at about $20,000, making the entire cost nearly $110,000. This outfit was sent back to the States, and was attached at Independence, Mo., by creditors of appellants. The liabilities of appellants at the time of assignment were $105,944 04. There were several agents and clerks in the store before assignment, and many depositors of money, and debts due for money loaned without interest, not named in the assignment. The assignees paid out to creditors upwards of $22,000, preferred creditors being paid, pro rata, as money was collected. Agents, clerks, depositors, and creditors, named in the deed, only were paid; the assignment was made because creditors were pressing the payment of their demands. Smith, one of the assignees, was agent and attorney for several of the creditors, whose demands amounted to some $20,000, and threatened to attach the property of the appellants should payment not be made. The books of the appellants, transferred upon the assignment, showed about $75,000 due them, but not above $3,000 or $4,000, could could be collected—the debtors held receipts, offsets, &c. Of the merchandise brought out, about $40,000 worth were sent to Chihuahua by the witness, leaving about $50,000 worth to be accounted for. The assignment was the 11th of Dec., 1848—two or three months after return of witness from Chihuahua. The goods from the States arrived in June or July, of the same year.

Smith, the other assignee, stated that some small depositors and the clerks and agents were paid in full. Assignment was made because creditors were urging payment. The assignee, Smith, as attorney for Lewis and Courtney, threatened to sue for them, but agreed to await the return of the Chihuahua adventure; had threatened before the return of the Chihuahua adventure to attach the

appellants' property. The Chihuahua expedition had gone as early as Sept. or Oct. Understood the amount of goods brought out in the summer of 1848 was $89,944 64. Lewis and Courtney, and Moodie and Simpson, were preferred as creditors, because they had assisted appellants in Independence when they were in difficulty. The deed of assignment was written out to be submitted to some other parties before signing, some short time before its execution; there was some other testimony, but it is not necessary to state it.

Appellants' counsel requested the court to instruct the jury—

1st. That as the assignment was the act of Leitensdorfer alone, with which Houghton had nothing to do, the act of one defendant would not authorize an attachment against two, and their verdict must be for the defendants.

2d. "Also, that the deed of assignment was not fraudulent in law; and unless the jury find from the evidence, that in fact, at the time of the commencement of this suit, the plaintiff had good reason to believe that the defendants had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, they must for the defendants.

3d. "Also, that as the plaintiff has shown no title to the note sued on, in himself he had no authority to sue, and the jury must find for the defendants.

4th. "Also, that if the assignees of the defendants had erred in paying off any of the creditors of the defendants, no advantage *good* (should) be taken of that matter in this suit, but it could only be complained of by the party injured thereby in a suit against the assignees."

The court refused all these instructions except the fourth, which it gave.

And further instructed the jury—

1. That said deed was fraudulent in law, for want of schedule thereunto annexed by the assignees of the property and effects conveyed to them by the defendants, and because of a want of a schedule thereto annexed of the preferred creditors, and because of the preference given to some creditors by said deed. That if the jury found from the evidence, that the defendants, or either of them, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, at the time of the commencement of this suit, they must find for the plaintiffs. That the execution of said deed by Leitensdorfer, unaccompanied by proper schedules, was such a fraudulent disposition in law as aforesaid.

2d. "That a commission of fraud in law by the defendants, or either of them, without any fraud, in fact, or without any intent to defraud, was a sufficient cause for attachment, as the commission of a fraud in fact, or with intent to commit a fraud.

3d. "That, on the trial of this issue, it was not necessary for the plaintiff to show himself a creditor of the defendants, further

than is shown in the affidavit, to entitle him to a verdict in his favor on this issue on the truth of the affidavit; that the sole issue was whether the defendants, or either of them, at the time of the commencement of this suit, had fraudulently disposed of their property and effects, so as to hinder, delay, and defraud their creditors."

To the refusal to give the 1st, 2d and 3d of these instructions, and to giving of the instructions above given, appellants excepted.

The jury returned a verdict for the plaintiff, and the defendants pleaded to the merits.

The appellants moved to set aside this verdict, and that a new trial might be granted, and the motion was also overruled by the court; whereupon a trial was then had upon the merits, and a verdict rendered for the plaintiff.

The defendants moved to set aside this verdict, and that a new trial might be granted, which motion was overruled by the court. The defendants then moved in arrest of judgment, and this motion likewise was overruled by the court.

Sundry bills of exceptions were taken by the defendants to the ruling of the court, and filed of record in the cause.

Appellants assign the following errors:

1. The district court erred in placing the cause upon its docket.
2. The district court erred in overruling the motion to set aside the verdict on the first issue.
3. The court erred in overruling the instructions asked for by the defendants.
4. The court erred in giving the instructions asked for by the plaintiffs.
5. The court erred in overruling the motion in arrest of judgment.
6. The court erred in overruling the motion for a new trial on the second issue.

As to the first point: By the 2nd sec. of the act of the legislative assembly, entitled "An act perpetuating and declaring in force acts, orders, and laws, and for other purposes," passed July 14th, 1851, it is provided "that all bonds, writs, and processes that have remained in force shall be carried to a final decision in the courts established by the legislative assembly, to the same effect as they would have been in the courts previously existing." See Acts, 176.

The third sec. of the act of the legislative assembly defining the judicial districts assigning the judges and fixing the times and places of holding the respective courts, passed July 10th, 1851, provides that "any judge of either district shall have power at any time, at his discretion, to hold a special term of the circuit court in any county of his district," &c. See Acts, 119, 120.

An act amendatory of this last act was passed on the 20th July, of the same session, wherein, after a recital in the preamble—"whereas (among other things) the word 'circuit' is used in the third section of said act, instead of 'district'"—it is enacted (sec. 1) "that

the word 'circuit,' wherever found in the third section of said act, shall be so construed and understood as to mean 'district.'"

These acts and parts of acts, being in pari matesi, must be taken and construed together.

It is insisted, on behalf of the appellants, that the district court had not power under these acts to take jurisdiction of this case.

1. Because the legislative assembly had no authority to pass the act providing for the transfer of the cause.

2. Because, if it had such power, it has not properly exercised it; in other words, that these acts are not sufficient to effect that purpose.

Before considering these points, it is proper to dispose of a preliminary objection raised on the argument of the cause, viz., that the circuit court of Santa Fé county was not a court in contemplation of law, and hence this cause never had a legal existence.

In the year 1846, a conquest of this territory was made by the American arms under General Kearney. The civil government then existing here having been completely overthrown and destroyed, a provisional or temporary government was established in its stead by the conquering general, under and by authority of the President of the United States, as commander-in-chief.

This was recognized and sanctioned by the law of nations. By that authority the circuit courts were established, their jurisdiction vested, and the proceedings therein regulated. But it is insisted that, upon the re-establishment of peace, the authority to establish such courts ceased to exist, and that such courts must necessarily cease with the power that created them.

By the act to establish the temporary government, art. 4, sec. 1, it is provided that the judicial power shall be vested in a superior court and inferior tribunals, to be established by law.

Sec. 2. That the superior court shall consist of three judges, to be appointed by the President of the United States. The judges * * * * shall hold courts at such times and places and perform such duties as shall be prescribed by law.

By section 1st, title courts and judicial powers, "it is further provided that the judges of the superior court shall be, ex officio, judges of the respective circuit courts."

By the 18th section, the circuit courts *is* thus defined:

"The circuit courts in the several counties in which they may be held shall have power and jurisdiction as follows: First. Of all criminal cases that shall not otherwise be provided for by law. Second. Exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes."

Here, then, we have established by competent authority a temporary or provisional government, consisting of the legislative, executive, and judicial powers, and a code of laws for the government of the people, to be administered by those powers. Upon the conquest it was competent for the President to have abrogated

all laws then existing in the Territory. This power, however, he did not exercise, save so far as the laws adopted here by his authority were inconsistent with the existing Mexican laws. On the contrary, it is provided by the first section, under the title "laws," that all laws heretofore in force in the Territory which are not repugnant to or inconsistent with the Constitution of the United States and the laws thereof, and the statutes in force for the time being, shall be the rule of action and decision in this Territory.

There is no question, then, as to the validity of these laws and these powers thus established and acknowledged by the conqueror, up to the time of the ratification of the treaty of peace between the belligerent powers. The unrepealed Mexican laws, and those adopted by the conquering power, were the laws existing in the country upon the restoration of peace.

What effect did the re-establishment of peace have upon these laws? Did the laws adopted by authority of the United States instantly cease, and the repealed Mexican laws as suddenly revive? Had the Territory been surrendered to Mexico under the treaty, the just post liminium would have operated, and the laws adopted and the changes in government made by the conquering power, would have been abrogated, and the Mexicans laws restored to their former force and effect.

"The right of post liminium," says Vatel, "is that in virtue of which persons and things taken by the enemy are restored to their former state, on coming again into the power of the nation to which they belonged." Vat., 33, ch. 14, sec. 204.

But the Territory having been retained by the United States under the treaty, the jus post liminium could have no operation. And it is believed it can be clearly shown, both by reason and authority, that these laws, just as they were at the ratification of the treaty of peace, remained in full force and vigor until they should be repealed by the acquiring power.

The law of nations upon this subject is stated with clearness by Ch. Justice Marshal, in delivering the opinion of the Supreme Court in the case of the American Insurance Company et al. vs. Canter, 1st Peters, 541. That case went up from the district court of the United States for the Territory of Florida, and involved to some extent the question of the force of the Spanish laws in that Territory. He says: "The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territories as a more military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations

the word 'circuit,' wherever found in the third section of said act, shall be so construed and understood as to mean 'district.'"

These acts and parts of acts, being in pari matesi, must be taken and construed together.

It is insisted, on behalf of the appellants, that the district court had not power under these acts to take jurisdiction of this case.

1. Because the legislative assembly had no authority to pass the act providing for the transfer of the cause.

2. Because, if it had such power, it has not properly exercised it; in other words, that these acts are not sufficient to effect that purpose.

Before considering these points, it is proper to dispose of a preliminary objection raised on the argument of the cause, viz., that the circuit court of Santa Fé county was not a court in contemplation of law, and hence this cause never had a legal existence.

In the year 1846, a conquest of this territory was made by the American arms under General Kearney. The civil government then existing here having been completely overthrown and destroyed, a provisional or temporary government was established in its stead by the conquering general, under and by authority of the President of the United States, as commander-in-chief.

This was recognized and sanctioned by the law of nations. By that authority the circuit courts were established, their jurisdiction vested, and the proceedings therein regulated. But it is insisted that, upon the re-establishment of peace, the authority to establish such courts ceased to exist, and that such courts must necessarily cease with the power that created them.

By the act to establish the temporary government, art. 4, sec. 1, it is provided that the judicial power shall be vested in a superior court and inferior tribunals, to be established by law.

SEC. 2. That the superior court shall consist of three judges, to be appointed by the President of the United States. The judges * * * * shall hold courts at such times and places and perform such duties as shall be prescribed by law.

By section 1st, title courts and judicial powers, "it is further provided that the judges of the superior court shall be, ex officio, judges of the respective circuit courts."

By the 18th section, the circuit courts *is* thus defined:

"The circuit courts in the several counties in which they may be held shall have power and jurisdiction as follows: First. Of all criminal cases that shall not otherwise be provided for by law. Second. Exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes."

Here, then, we have established by competent authority a temporary or provisional government, consisting of the legislative, executive, and judicial powers, and a code of laws for the government of the people, to be administered by those powers. Upon the conquest it was competent for the President to have abrogated

all laws then existing in the Territory. This power, however, he did not exercise, save so far as the laws adopted here by his authority were inconsistent with the existing Mexican laws. On the contrary, it is provided by the first section, under the title "laws," that all laws heretofore in force in the Territory which are not repugnant to or inconsistent with the Constitution of the United States and the laws thereof, and the statutes in force for the time being, shall be the rule of action and decision in this Territory.

There is no question, then, as to the validity of these laws and these powers thus established and acknowledged by the conqueror, up to the time of the ratification of the treaty of peace between the belligerent powers. The unrepealed Mexican laws, and those adopted by the conquering power, were the laws existing in the country upon the restoration of peace.

What effect did the re-establishment of peace have upon these laws? Did the laws adopted by authority of the United States instantly cease, and the repealed Mexican laws as suddenly revive? Had the Territory been surrendered to Mexico under the treaty, the just post liminium would have operated, and the laws adopted and the changes in government made by the conquering power, would have been abrogated, and the Mexicans laws restored to their former force and effect.

"The right of post liminium," says Vatel, "is that in virtue of which persons and things taken by the enemy are restored to their former state, on coming again into the power of the nation to which they belonged." Vat., 33, ch. 14, sec. 204.

But the Territory having been retained by the United States under the treaty, the jus post liminium could have no operation. And it is believed it can be clearly shown, both by reason and authority, that these laws, just as they were at the ratification of the treaty of peace, remained in full force and vigor until they should be repealed by the acquiring power.

The law of nations upon this subject is stated with clearness by Ch. Justice Marshal, in delivering the opinion of the Supreme Court in the case of the American Insurance Company et al. vs. Canter, 1st Peters, 541. That case went up from the district court of the United States for the Territory of Florida, and involved to some extent the question of the force of the Spanish laws in that Territory. He says: "The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territories as a more military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations

are created between them and the new government, that has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remained, and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the State."

Upon the transfer of the country, then, under the treaty of peace, all the laws which regulated the intercourse and general conduct of individuals, remained unchanged, as well those adopted under the authority of the United States as the unrepealed Mexican laws; and none but those which were political in their nature, such as effected their relations with their former and their connection with their new sovereign, were changed. Such being understood to be the law, it is deemed unnecessary to consider the power of the President, in respect to the government of the Territory after the treaty of peace, and previous to the passage of the organic law.

1st. Then as to the power of the leg. as., to pass the act providing for the transfer of causes from the circuit to the district court. This objection seems to be without force. Could the Congress of the U. S. have passed a law authorizing such transfer? That body, in legislating for the Territories, exercises the combined powers of the legislation, which are vested in the State and federal governments. There is, certainly, nothing in the Constitution of the United States, or in the nature of the subject, to prohibit the passage of such a law. If Congress, then, could pass such a law, it could confer that power upon the leg. as., and it has done so in the organic law to a very enlarged extent.

It is declared in the 7th sec. of that law, that "the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act." The transfer of these causes, and thus virtually reviving them, was a rightful subject of legislation, not inconsistent with the Constitution or the organic law; it is no more than the providing for the revival of an abated suit, or for the transfer of a cause from one jurisdiction to another for trial; acts of legislation similar to which are to be found in the statutes of almost every State in the Union.

2d. Do the acts of the leg. as. above quoted authorize the district court to take jurisdiction of these causes? In endeavoring to arrive at the true construction of statutes, which may be of doubtful meaning, it is safe to be guided by the well-established rules which govern such construction. "Such construction ought to be put upon a statute as best meets the intention of the makers; which intention is sometimes to be collected from the cause or necessity of making the statutes, and sometimes from other circumstances. And when such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statutes—

although such construction seems contrary to the letter of the statute.

A thing which is within the intention of the makers of a statute, is as much within the statute as if it was within the letter; and a thing which is within the letter of a statute, is not within the statute unless it be within the intention of the makers, and such construction ought to be put upon it as does not suffer it to be eluded, 6 Bac. Abr., I, 5, 10, p. 379; 15 Johns., 12, 379, 7; Mass., 485; 1 Black. Com., 61; 1 Kent, p. 461. If the meaning of a statute be doubtful, the consequences are to be considered in the construction, 6 Bac. Abr. 391.

What was the cause or necessity of making the statute before quoted? A court which had been legally established, with jurisdiction of causes of a class to which this case properly belongs, had, upon the taking effect of the organic law, ceased to exist, leaving unsettled a number of cases then pending, involving rights and interest to a large amount; no provisions for them having been made in the organic law. To provide that these cases should not absolutely and finally abate, was a rightful subject of legislation.

Is it that the district courts established by the organic law, are the only courts in the Territory to whose jurisdiction these cases properly appertain? It is equally clear that the leg. as. did not intend that these causes should absolutely and finally abate.

And we must presume (exercising reason and discretion) that it intended they should be transferred to and disposed of by a court of competent jurisdiction.

By the 10th sec. of the organic law, it is provided that "the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace." Here is the whole judicial power of the Territory. In the same sec. it is provided that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and justices of the peace, shall be as limited by law." A part of the jurisdiction of the district court is defined and limited by the organic law, which gives it the combined jurisdiction of both the circuit and district court of the United States. Another portion of its jurisdiction is defined and limited by the Kearney code, and by subsequent statutes; and among these are the statutes before quoted, providing for the transfer of these causes from the old circuit court, and for their final disposition in the district courts.

It must be presumed that the object of the leg. as. was neither unjust, contradictory, nor absurd.

It is true, the language used in the statutes is not the most felicitous that might have been used for the expressions of its obvious intentions. Nevertheless, it is sufficiently so to lead, under the recognized rule of construction, to a satisfactory comprehension of the meaning intended to be conveyed. The object of a law may sometimes be ascertained by reference to the title or to the pream-

ble. The act of July 14th is entitled, "An act declaring in force acts, orders, and laws, and for other purposes."

The 2d sec. provides "that all bonds, writs, and processes. that have remained in force, shall be carried to a final decision in the courts established by the legislative assembly, to the same effect as they would have been in the courts previously existing." As the leg. as. had no power to establish courts, and as it is clear beyond doubt that its intention was, that these cases should "be carried to a final decision," it seems equally clear that this final decision must be in the newly established courts, to whose jurisdiction these cases properly belong, or else the legislative act must be adjudged an absurdity.

In taking cognizance of these causes there can be no difficulty. Each court is competent to determine the extent of its own jurisdiction, and whether any particular case from the former courts properly falls within it, and to take or decline the same accordingly.

Nor is there any well-founded doubt as to the meaning of the words of the statutes, "the courts established by the legislative assembly." The whole judicial power of the Territory had been vested in certain courts specified in and created by the organic law. The legislative assembly must be presumed to have known that it had no power to create or establish courts in the proper sense of these terms. It had only a few days before the passage of the act now under consideration, on the 10th of July, passed the act "defining the several judicial districts, assigning the several judges to their respective districts, and defining the times and places of holding courts."

The third sec. of this act provides, that "any judge of either district shall have power to hold a special term of a circuit court in any county in his district." Here the leg. as., in using the words "circuit court," committed an error, of which it seems it afterwards became sensible, and to remedy which it passed the act of 20th July, already quoted.

In the act of the 14th of July, the word "established," in the sentence, "the courts established," is in the past tense, and must be taken to refer to an act then already passed; and as the act of July 10th was the only act which had then been passed upon the subject, to it alone could reference been had. The leg. as. may have supposed, however, that the act of organizing districts, assigning the judges, and fixing the times and places of holding the courts, was in some way "an establishing of courts," and was hence let to use these terms in the act of the 14th of July.

Such an error would, however, in no degree weaken the force of the act. If these cases can be "carried to a final decision," in the courts only established by the leg. as., as contended on the part of the appellants, then, as the leg. as. has created and can create no

courts, it follows that its legislation touching this subject must be treated as a nullity.

This would be to violate the well-established rules of construction applicable to the facts of the case.

II. As to the refusal to set aside the verdict on the first issue.

This issue involved the truth of the affidavit upon which the attachment issued. The affidavit contains all that was required to authorize the writ to be issued: the amount of the debt, that the plaintiff had good reason to believe, and did believe, that the defendants had fraudulently disposed of their property and effects, so as to hinder, delay, and defraud their creditors, in the language of the act.

The defendants, by their plea, say, "that at the time of the institution of this suit, &c., they, the said defendants, had not fraudulently disposed of their property and effects, so as to hinder, delay or defraud their creditors." Such is the issue, and it involved simply the question whether or not they had made such a disposition of their property and effects, and nothing more. The justice of this decision of the court depends upon its ruling, in refusing and giving instructions to the jury. These instructions have already been inserted herein. There is no direct proof of a dissolution of the partnership, although it is inferible from the instrument of assignment and the testimony of some of the witnesses. The rule of law is, that when a partnership once exists, it continues to exist as to its creditors, (notwithstanding it may have been regularly dissolved as between the members,) and also, in case of the insolvency of the concern, as to the partnership effects; and the partnership estate cannot be used in a manner inconsistent with the winding up of the concern. Hence, notwithstanding a dissolution of the firm may have taken place between Leitensdorfer & Houghton, they still were partners as to their joint creditors, and also, being insolvent, as to the partnership estate. The deed of assignment, it is true, is made on the one part by Leitensdorfer alone, but it recites that he, "as a partner of the late firm of E. Leitensdorfer & Co., is legally indebted;" and then proceeds to convey "all of his own goods," wares, and merchandise, and also "all his property and effects of the late firm of E. Leitensdorfer & Co." It appears to have been executed on the 11th December, 1848, and on the same day (and it is presumed at the same time) the other member of the partnership virtually ratified this act of Leitensdorfer, by endorsing on the assignment, in writing under his hand and seal, his authority to the assignees named in the deed to use his name and to sign his name in any manner that it might be necessary for them to use it in settling up the business of the late firm of E. Leitensdorfer & Co." Thus, Houghton, by empowering the assignees to use his name for all the purposes contemplated by the assignment, sanctions the acts of Leitensdorfer; and so far as these

tend to hinder, delay, or defraud the creditors of the firm, becomes equally implicated with him.

In a suit against partners, all the members must be joined, for they are, so far, considered as but one person. The act of one partner, touching the partnership concerns, is the act of and binds all the members of the firm; so the fraud of one partner, in respect to the partenership estate, affects all the others, and especially where it is with their privity or consent. If this were not so, it would be impossible to make the attachment process effectual against any partnership, however grossly fraudulent its acts might be, so long as there should be one honest member of the concern. The first instruction asked for is not law, and was properly refused. The first part of the second asked for by the appellants, will be considered in connection with the instruction given—the remaining part of the instruction having been subsequently given in substance. The third instruction was properly overruled. The mere possession of the note was sufficient evidence of property in the same to entitle the holder to sue, especially when endorsed as this was. Besides, the property in the note was not in issue on the trial of the first issue. The next instruction given by the court was, that the deed of assignment was fraudulent in law. To determine the correctness or incorrectness of this instruction, involves a consideration of the loss, regulation, and controlling such transactions in force in this Territory at the date of the assignment; if under these it be valid, the instruction was erroneous; if invalid, it was correct.

It has already been seen that the Mexican laws, as modified by the Kearney code, remained in force in this Territory after the restoration of peace; and as the deed of assignment bears a subsequent date, it follows that its character must be determined by the Mexican laws so modified.

The Mexican laws which regulate and control the disposition of the property and effects of insolvents and bankrupts, so far as we have been able to consult them, may be found in 5 Febrese, 352, cha. 10; Lossiete Portidos Fit., 15, part 5, and in White's Recopilacion, vol. 1, p. 170 to 175, and the authorities there cited. Two proceedings are prescribed by which their property and effects may be disposed of for the payment of their debts. 1. Cession of property. 2. Concurso, or meeting of creditors of the debtors, by which the creditors secure what is due to them, so far as the amount of their property is capable of satisfying them. By the proceeding of cession, (termed surrender in the Postida,) those who are unable to pay their debts with the property they possess, cede it to their creditors, in order that they may be paid out of it as far as it may be sufficient.

This cession or surrender may be made—

1st. By every person who is his own master, or who is subject to the power of another, not having the means of paying his debts.

2d. The cession ought to be made before the judge by the debtor

himself, or by his attorney, acknowledging his debts, and after sentence has been given against him.

3d. It is to be done by petition of the debtors to the proper judge, stating the reason upon which it is founded, accompanied by two memorials or schedules, one of his property and effects and the other of his creditors, praying that the cession may be admitted; the petitioner being held to merely nominal security to pay any balance that may be, if he should become able. To authorize this cession, Febreso and Palacios both say at least three creditors are necessary, and their names must be set forth in the schedule or list to be given by the debtors at the time of making the cession.

The concurso, or meeting of the creditors, is the other proceeding, whereby creditors obtain payment as far as the insolvent's effects will satisfy their demands, and in which the debtor cites all his creditors, in order to be paid according to the force and priority of the right of each. The concurso differs from the surrender of property in this—

1. Because, in concurso, as the only contention is with respect to the strength and preference of the sum due to the creditors, the amount due to each of them ought not to be expressed in the schedule or list of creditors.

2d. Because, in the proceeding of concurso, each creditor is cited individually and particularly.

3d. Because bankrupts may form a concurso, but cannot make a cession.

In reference to these two modes of proceeding, Palacios says, that it ought to be observed, in order to avoid confusion and mistake, that what is said of one appertains to the other, and that really they are the same thing, whether under the name of cession de bienes or under that of concurso voluntario y preventivo, the first being called cession de bienes, because the debtor makes the cession, and the other concurso, because the creditors resort to it, and that there is no effectual difference between cession and concurso. They are both directed to the same end—the payment of the debts due by the insolvents, as far as the property will go in satisfaction of them. Such are the general rules of the Mexican law which were applicable to and controlled the disposition of the property and effects of insolvent debtors in this Territory, at the date of the assignment. If there are other and different laws bearing upon the subject, they have not been cited to us, neither have they been found.

By what authority, then, shall the validity or invalidity of this assignment be determined?

By the 10th sec. of the organic law, it is provided that "the supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction." Jurisdiction is properly the power to hear and determine causes.

The common law, then, at least so far as to control and regulate the proceedings of the district court, in the hearing and determining of

causes, has been extended over this Territory by the act of Congress; and that court, when it proceeds to hear and determine, must observe the course and proceedings prescribed by the common law, although the right and liabilities of parties are to be determined according to the Mexican laws in force, and the acts of Congress, and of the leg. as., applicable to the subject. In courts whose proceedings are according to the course of the common law, it is the duty of the court to pronounce upon the legal validity or invalidity of instruments of the class of the assignment in this case, and to determine all questions of fraud in law, which may arise in the progress of a cause. This is a principle which need not be supported by reference to authorities. The question, then, of the validity of this deed of assignment, when introduced in evidence, was to be determined by the court, and by reference to the laws in the Territory at the time the assignment was made.

Any attempt by the appellants, by means not sanctioned by the laws then in force, to dispose of their property and effects, and which tends to hinder and delay their creditors, was in law fraud.

The doctrine of constructed fraud, (or fraud in law,) says Story, although they may seem to be of an artificial if not of an arbitrary character, are founded in an anxious desire of the law to apply the preventive principle of justice, so as to shut out the inducements to perpetrate a wrong, rather than to rely on a mere remedial justice after a wrong had been committed, I Story, E. Jur'e, 280. Thus acts contrary to public policy, to sound morals, to the provisions of a statute, &c., however honest the intentions with which they may have been performed, are deemed constructive frauds, or frauds in law, and are absolutely void. The policy of the Mexican laws in force, have had prescribed certain modes in which the property of insolvents should be disposed of for the benefit of their creditors. It is clear that the parties to the assignment in this case did not comply with the essential requisites of these laws in their attempt to dispose of the property of the appellants. No petition was presented to any judge or court. No schedule of debts or of creditors was made out and submitted. No sentence of a court or a judge sanctioning a cession or surrender. No citation of creditors, general or special. The parties to the assignment saw proper to disregard the requirements of the law in their attempt to dispose of their effects, and the ordinary consequence must follow. The instruction of the court upon this point was therefore correct.

This also disposes of the 3d and 4 errors assigned, as they are based upon the ruling of the district court, in giving and refusing instructions to the jury.

It is objected that the court erred in overruling the motion to set aside the verdict on the trial of the second or main issue. It is difficult to perceive any foundation for this objection, as the second contains no part of the evidence upon the trial of this issue.

The verdict of the jury must be presumed to have been founded upon sufficient evidence.

This, then, in the absence of the evidence, cures any defect that may have existed upon the score of evidence.

Lastly, it is insisted that the district court should have arrested the judgment, upon a critical examination of the record, and upon the best examination of the laws bearing upon the case which circumstances have permitted. I am unable to see any sufficient grounds to support this objection.

Some stress has been laid on the reasons assigned by the district court for its instructions. It has never been held, I believe, that if instructions be correct in themselves they shall be deemed invalid because an erroneous reason may have been given for them. To allow such obligations to prevail, would be to lose sight of the merits of the case, and to decide it upon mere quibble.

It has been so well settled by the Supreme Court of the U. S., that the body of the common law, as a system of jurisprudence, has not been adopted in the federal courts, that it has ceased to be a mooted point. But even if the "common law jurisdiction," conferred by the organic law upon the district court, could be extended to the determination of rights and liabilities originating subsequently to the adoption of the organic law, it surely cannot apply to the case originating prior thereto.

I have not treated this case as one determinable by the principles of the common law, for that law had not, at the date of this assignment, any force in this Territory, and it would violate a plain maxim of all municipal law, that contracts must be determined according to the lex loci by the law of the place where made, unless stipulated otherwise—a maxim resting upon the reasonable presumption that all men contract with reference to the existing laws. Apply this rule to the case, and we are forced to determine the character of this assignment by the Mexican law, as modified by the Kearney code. I hold that the courts of the Territory are bound to be governed in their adjudication upon rights and liabilities by the Mexican laws as modified by statutes, and by no other. We may look to other similar systems with a view to illustrate but not to change the positive provisions of our own. In Florida the Spanish law prevails under modifications, where they look to the Spanish authorities for the law. In Louisiana the same system prevails to a certain extent. At one time it existed there in all its vigor. When the Territory passed under the dominion of the French, the civil law, as modified by the policy of that nation, was introduced, to a certain extent, and as far as it was inconsistent with, repealed or modified the Spanish law. Those systems, thus adopted, prevail there at this day. The Spanish civil law and the French civil law are derived from the same source—the Roman civil law and are scarcely more dissimilar than the common law of New York and that of Indiana. It would, therefore, be much more

just to look to the civil law of Louisiana for rules to guide us than to the common laws of any State. I find that in the civil code of law, the principles of the Mexican law, in relation to insolvents and their estates, are strongly supported. By act 1779, of that case, it is provided, that "every contract shall be deemed to have been made in fraud of creditors when the obligee knew that the obligor was in insolvent circumstances; when such contract gives the obligee, if he be a creditor, any advantage over other creditors of the obligor. And by act 1780, it is provided that, "by being in insolvent circumstances, is meant that the whole property and credits are not equal in amount at a fair appraisement to the debts of the party." Such is the French and Spanish civil law as it is adopted in La., and it is certainly quite as strong against the transaction in this case as the Mexican law. But whatever be the laws of other States, I am bound by the Mexican laws as they prevail in this Territory. To disregard and to seek elsewhere for rules to govern the case would be to legislate, not to adjudicate.

I have examined the common law cases having analogy to this, and have been unable to find any one wherein assignment has been sustained, in which it has been attempted to prefer creditors simply by a classification of their claims, without the names of the creditors or the amount of their demands. On the contrary, in the case of Naylor et al. vs. Fordie, 4 Dayes' Cases, 146, the most strictly analagous to this, the assignment was declared void, although it was more certain in its details than this, and was accompanied with schedules. But this case is not determinable by the common law.

I am therefore of the opinion that the judgment of the 1st district court ought to be affirmed.

(Signed) BAKER.

And afterwards, to wit, on the day and year last aforesaid, Justice Watts, associate, delivered the following dissenting opinion in said cause, as follows:

Error to Santa Fé county, first district court.

EUGENE LEITENSDORFER and JOAB HOUGHTON
vs.
JAMES J. WEBB.

Watts, justice, dissenting. James J. Webb, on the 30th of June, 1849, sued out a writ of attachment against Leitensdorfer and Houghton. This attachment was pending in the circuit court before the passage of the organic law of this Territory. It was, under an act of the legislative assembly, transferred to the United States district court for the 1st district. Issue was joined by the defendants upon the truth of the affidavit in attachment. At the

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October term, 1852, of the United States district court, this issue was tried by a jury, and a verdict rendered for the plaintiff on that issue. Subsequently, during the same term of court, the cause was tried on its merits, and a judgment rendered for the plaintiff for the sum of $10,330 25. Motions for a new trial were made, and overruled on both the above issues, and final judgment was rendered in favor of Webb, against Leitensdorfer and Houghton, on the above verdict. Leitensdorfer and Houghton then brought the cause into this court, by appeal, and seek to set aside this judgment for errors alleged to have been commited in the trial of this cause in the court below. The affidavit in attachment is as follows:

"This affiant, James J. Webb, being duly sworn, makes oath, and says that Eugene Leitensdorfer and Joab Houghton, doing business under the name and style of E. Leitensdorfer & Company, are justly indebted to James J. Webb, in the sum of eight thousand two hundred and ninety-seven $\frac{49}{100}$ dollars, ($8,297 $\frac{49}{100}$,) after allowing all just credits and offsets on account of a certain promissory note drawn by said firm of E. Leitensdorfer & Co., in favor of the firm of Doan, King & Co., and by said last-mentioned firm made payable to J. J. Webb or order, being the same which is set forth in the petition, and being for the amount of eight thousand two hundred and ninety-seven $\frac{49}{100}$ dollars, ($8,297 $\frac{49}{100}$;) and this affiant has good reason to believe, and does believe, that the said Eugene Leitensdorfer and Joab Houghton, doing business under the style and firm of E. Leitensdorfer & Co., have fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors.

(Signed) JAMES J. WEBB.

"Sworn to and subscribed before me, the 30th of June, 1849.

(Signed) J. M. GIDDINGS,
Clerk."

This affidavit for an attachment is based upon the 1st section of the law in Kearney's code, regulating the action of attachment, which provides, that—"Creditors whose demands amount to fifty dollars or more, may sue their debtors in the circuit court by attachment, when (among other causes) the debtor is about to remove his property or effects out of this Territory, or has fraudulently concealed or disposed of his property or effects, so as to defraud, hinder, or delay his creditors." See laws of the Territory of New Mexico, page 39, section 1st. By the 16th section of the same act, it is provided, that—"In all cases when property or effects shall be attached, the defendant may, at the court to which the writ is returnable, put in his answer without oath, denying the truth of any material fact contained in the affidavit to which the plaintiff may reply; a trial of the truth of the affidavit shall be had at the same term, and on such trial the plaintiff shall be held to prove the

existence of the facts set forth in the affidavit, as the ground of the attachment; and if the issue shall be found for him, the cause shall proceed, but if it be found for the defendant, the cause shall be dismissed at the costs of the plaintiff."

Under this section of law the defendants filed to said affidavit the following answer:

"And the said defendants, by their attorneys come and defend the wrong and injury, when, &c., and pray judgment of the said action, because they say that at the time of the institution of this suit, to wit, on the 30th day of June, A. D. 1849, they, the said defendants had not fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, and this the said defendants are ready to verify; wherefore they pray judgment of the said action, and that the same may be dismissed.

(Signed) SMITH & GARY,
For Defendants."

The issue thus created by the affidavit in attachment, and the answer to that affidavit, is this: Webb, the plaintiff in attachments, alleged that Leitensdorfer and Houghton "had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors." This allegation Leitensdorfer and Houghton denied, and this denial made it incumbent upon Webb to prove that Leitensdorfer and Houghton "had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors." On the trial of this issue, the plaintiff, Webb, for the purpose of proving such fraudulent disposition of property on the part of the defendants, Leitensdorfer and Houghton, introduced and read to the jury the following deed of assignment:

"This indenture, made and entered into this eleventh day of December, in the year of our Lord one thousand eight hundred and forty-eight, by and between Eugene Leitensdorfer, of the first part, and Hugh N. Smith and Thomas Biggs, of the second part, all of the county of Santa Fé, and Territory of New Mexico, witnesseth, that whereas Eugene Leitensdorfer, as partner in the late firm of E. Leitensdorfer and Company, is largely indebted, and whereas he wishes to secure his creditors as far as his effects will extend or can be made to extend, he, the said Eugene Leitensdorfer, the party of the first part, has this day assigned, conveyed, and transferred all and singular his goods, wares, and merchandise, and all his property and effects of the late firm of E. Leitensdorfer and Company, unto Hugh N. Smith and Thomas Biggs, the parties of the second part, to have and to hold the same, upon the conditions hereinafter mentioned, for the use and benefit of the creditors of Eugene Leitensdorfer; and the said Hugh N. Smith and Thomas Biggs undertake, promise, and bind themselves to sell and dispose of the property so assigned to them, and to receive and collect all the property, accounts, debts, and moneys due the said Eugene

Leitensdorfer, and due the late firm of E. Leitensdorfer and Company, as far as it is in their power to collect the same, and to dispose of the proceeds or moneys arising from said sales and collections for the use and benefit of the creditors of E. Leitensdorfer and Company and of Eugene Leitensdorfer, in the following manner, that is to say: First. The clerks and agents now serving in the store-house of E. Leitensdorfer, in the city of Santa Fé, are to be paid their wages, and all arrearages due them; then, after paying the actual current expenses of conducting the business assigned to said Smith and Biggs, they, the said Smith and Biggs, are to pay as fast as the assets are collected or converted into money, all the annexed debts, as being those placed in the list of preferred creditors, for money borrowed or deposited, or such as Eugene Leitensdorfer may have considered himself more especially bound to pay, which are the following: To Lewis and Courtney, nineteen thousand nine hundred and ninety-four $\frac{12}{100}$; Modie & Simpson, seventeen hundred and forty-five $\frac{50}{100}$ dollars; to A. La Raux, four hundred and sixty-two $\frac{33}{100}$ dollars; and to Henry O'Neil, fourteen hundred and fifty dollars, and all other sums of money due by E. Leitensdorfer and Company for simple deposits or money loaned without interest; and after which payments of preferred creditors, with all assets collected, they, the said Smith and Biggs, are to pay all the other creditors, pro rata, until the assets are expended. But it is expressly understood and agreed that the said Smith and Biggs are to settle up, manage, and conduct the said business so assigned to them, and to sell and dispose of all the property assigned to them, as to them seems best for the interest of all the creditors; and that they, the said Smith and Biggs, are to be paid for their labor, diligence, and attention to said business, a fair and reasonable compensation from time to time; and the said Smith and Biggs agree to have made out and annexed, within ten days after the signing of this indenture, a fair and correct list of the liabilities of E. Leitensdorfer and Company, and also a fair and correct list, as far as can be made, of all the assets which they can control, and to keep a correct set of books, exhibiting the condition of the business assigned to them, until the assets are all expended, as before mentioned; and the said Smith and Biggs are hereby empowered and authorized to sue for and collect all debts or sums of money due the firm of E. Leitensdorfer and Company and E. Leitensdorfer, in their own names, as assignees, and to collect and keep all the books, papers, and accounts which may be necessary to settle the business of the firm of E. Leitensdorfer and Company; and it further understood and agreed, that in case of the death of either the said assignees, Smith or Biggs, or in case either should renounce the trust and assignment hereby confided to them, the same power and authority are hereby continued and granted to the survivor or remaining one of the said assignees.

In testimony whereof, we have hereunto set our hands and seals,

this 11th day of December, one thousand eight hundred and forty-eight.

E. LEITENSDORFER, [SEAL.]
(Signed) HUGH N. SMITH, [SEAL.]
THO'S BIGGS, [SEAL.]

Signed, sealed, and delivered in the presence of—
(Signed) CERAN ST. VRAIN,
CHARLES BLUMNER.

Under this deed, is the following instrument executed by said Houghton:

Know all men by these presents, that I, Joab Houghton, do hereby authorize and empower Hugh N. Smith and Thomas Biggs, as assignees of Eugene Leitensdorfer and Company, to use my name and to sign my name in any way that it may be necessary for them to use it in settling the business of the late firm of E. Leitensdorfer and Company.

Given under my hand and seal, this 11th day of December, A. D. 1848.

(Signed) J. HOUGHTON, [SEAL.]

Witness—
(Signed) CERAN ST. VRAIN.

It is in proof, by the testimony of Mr. Biggs, that the list of the debts and assetts of the firm of E. Leitensdorfer and Company was made out in four or five days after the assignment.

The defendants requested the court to give the following instructions:

1st. "As the assignment was the act of Leitensdorfer alone, with which Houghton had nothing to do, the act of one defendant would not authorize an attachment against two, and the verdict must be for the defendants."

This instruction was refused.

2nd. "That the deed of assignment was not fraudulent in law; and unless the jury find from the evidence, that in fact, at the time of the commencement of this suit, the plaintiff had good reason to believe that the defendants had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, they must find for the defendants."

This instruction was refused.

3rd. "That as the plaintiff had shown no title to the note sued on in himself, he had no authority to sue, and the jury must find for the defendants."

This instruction was refused.

4th. "That if the assignees of the defendants had erred in paying off any of the creditors of the defendants, no advantage could

be taken of that matter in this suit, but it could only be complained of by the party prejudiced thereby, in a suit against the assignees." This instruction was given. The defendants, Leitensdorfer and Houghton, excepted to the refusal of the court to give the first, second, and third instructions above set forth.

The court then gave to the jury the following instructions—

"That said deed was fraudulent in law, because of the want of a schedule thereto annexed by the assignees of the property and effects conveyed to them by the defendants; and because of the want of a schedule thereto annexed of the preferred creditors; and because of the preference given to some creditors by said deed; also that if the jury found that the defendants, or either of them, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, at the time of the commencement of this suit, they must find for the plaintiff. That the execution of said deed of assignment by Leitensdorfer, unaccompanied by proper schedules, was such a fraudulent disposition in law as aforesaid; and that the commission of a fraud in law by the defendants, or either of them, without any fraud in fact, or without any intent to defraud, was as sufficient cause for attachment as the commission of a fraud in fact, or with intent to defraud; also that in the trial of this issue it was not necessary for the plaintiff to show himself a creditor of the defendants further than is shown in the affidavit, to entitle him to a verdict in his favor, upon the issue on the truth of the affidavit, but that the sole issue was, whether the defendants, or either of them, at the time of the commencement of this suit, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors."

To the giving of the above instructions the defendants excepted.

The third instruction asked for by the defendants, and refused by the court, and the fourth instruction asked for by the defendants, and given by the court, were immaterial to the issue when on trial, and the giving or refusing them could not affect this case. The issue was whether Leitensdorfer and Houghton had "fraudulently disposed of their property or effects, so as to defraud, hinder, or delay their creditors." Whether the assignees had or had not discharged their duty in making payments under the deed, could not be material to that issue. It is a well settled principle of law, that a fact alleged in a bill in chancery, and not denied in the answer, must be taken to be true. Connel v. Claypool, 8 Blackford, page 124.

It is an equally well established rule of pleading, that every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse. Stephens on Pleading, page 216 and 217.

From these authorities, it seems clear that the pleading must be regarded as having admitted and confessed the indebtedness set forth in the affidavit of Webb, by not denying it in the answer put

in by the defendants to that affidavit—and hence it was unnecessary to prove a fact which was thus admitted by the pleadings to be true. Under this view of the case, the court below committed no error in refusing to give the 3rd instruction asked for by the defendants. The substance of the instructions given by the court below is about this:

The deed of assignment made by Leitensdorfer to Smith & Biggs is fraudulent in law, for the following causes:

1st. Because of the preference given to some creditors by said deed.

2nd. Because of the want of a schedule thereto annexed by the assignees of the property and effects conveyed to them by the defendants.

3rd. Because of the want of a schedule thereto annexed of the preferred creditors, and that the execution of this deed of assignment, fraudulent in law for the three causes above-mentioned, sustained the affidavit in attachment, without the existence of any fraud in fact, or intent to defraud.

If these instructions are in conformity with the law, the verdict of the jury on the first issue was correct; if they are not in accordance with law, the court gave erroneous instructions to the jury, and the motion for a new trial should have been sustained by the court, and the overruling of the motion for a new trial was error. The subject of preference in a deed of assignment of one creditor over another, and its effect upon the validity of the deed, has been often adjucated upon in almost every State in the Union, and some contradictory decisions may have been given, and some the apparent contradiction of which is easily explained. It seems to be clearly established, that in the absence of any statutory prohibition and of a bankrupt law, a debtor may at any time before liens have attached upon his property, make a general or partial assignment to a trustee for the benefit of his creditors, with preferences, which assignment will be valid in law, as against the process of creditors from the time of the execution of the deed.

The following authorities will be found to support this position:

Breashear v. West et al., 7 Peters, page 609, 614; Lippencott v. Barker, 2 Binney, 174, 186; Wilkes & Fontaine v. Ferris, 5 Johnson, 335; De Ferest v. Bacon, 2 Connecticut, 633, 637; McCollough et al. v. Sommerville, 8 Leigh., 416, 426; Niolen v. Douglass et al. 2 Hill's Chan., 443, 446; Smith Wugert, & Co. v. C. C. Campbell & Co., Rice, 353, 366; Moore v. Collens, 3 Devereux, 126, 134; Pearson & Andveson v. Rockhill & Co., 4 B. Munroe, 296, 297; Cross v. Bryant et al., 2 Scammon, 27, 43; Grever v. Wakeman, 11 Wendell, 200, 203; Hempsted v. Starr, 3 Day, 340.

In this Territory, there being in force no statutory prohibition against assignments giving preference to one creditor over another, and no bankrupt law, the above authorities are in point and seem

to be sufficient to establish the doctrine that a deed of assignment is not fraudulent in law because it prefers one creditor to another. It is perfectly competent for the legislative assembly, if it chooses to do so, to pass an act prohibiting assignments, with preferences to creditors, but until such law is passed the general doctrine must govern this case. The decisions which generally appear to conflict with the above cited authorities upon the subject of preference, are for the most part made under the authority of statutes of the different States which prohibit the making of assignments with preferences to creditors. Notwithstanding preferences in general assignments are good, as established by many decided cases, yet such preferences have been prohibited by the laws of several States, as follows:

In New Jersey, by act of 23d Feb., 1820, Rev. Laws, 674.
In Maine, by act of April 1st, 1836, 3 Laws of Maine, 550.
In New Hampshire, by act of July 5th, 1834.
In Connecticut, by act of 1828, c. 3 p., 182.
In Massachusetts, by act of 1836, c., 238.

In Ohio, by act of 1835 and 1838, all assignments with preferences enure to the benefit of all the creditors of the assignor; and in Pennsylvania, by act of 17th of April, 1843, all assignments with preference, except for payment of wages of labor to the extent of $50, enure to the benefit of all the creditors. The doctrine of preference, in all those States in which the principle of preference has not been proscribed by the statute, is now viewed with strong disfavor by the courts; and the determination seems to be universal not to countenance it further than a respect for adjudged cases requires. See Boardman v. Halliday, 10, page 224, 299; Cram. v. Mitchel, 1 Sandford, 251, 253.

So far as the abstract right of the debtor to prefer his creditors is concerned, the view which is most generally adopted, seems to be this: that inasmuch as the claims of creditors may be meritorious in unequal degrees, and inasmuch as particular creditors have it in their power to obtain a priority by legal proceedings, the preference of creditors is an alolwed object or result of a debtor's assignment, but that it is not permitted to be used as a means of accomplishing ends which are not the legitimate objects of a debtor's efforts. These authorities seem to be clear and conclusive in establishing the fact that the deed of assignment now under consideration is not fraudulent in law because of the preference given to some creditors. Is this deed fraudulent in law because of the want of a schedule thereto annexed by the assignees of the property and effects conveyed to them by the defendants? The court below instructed the jury that it was fraudulent in law for want of this schedule. This point has been decided in several States of the Union. In New Hampshire it has been decided that a schedule containing a detailed specification of the property transferred is

not necessary, in general, to the validity of an assignment for the benefit of creditors. Bundlett v. Dole, 10 N. Hamp., 458.

In Connecticut a similar decision was made. Clark v. Mix, 15 Conn., 152.

In Virginia a similar decision was made. Keran v. Branch, 1 Grattan, 274.

In Massachusetts a similar decision was made in the case of Woodward v. Marshall, 22 Pick., 468.

In Pennsylvania a similar decision was made in the case of Wilt v. Franklin, 1 Binn, 502.

In Missouri a similar decision was made, in the case of Duval v. Raisin, 7 Missouri Rep., 449.

In this Missouri case, a list of assets and liabilities was referred to in the deed as part thereof, but in fact were not made out by the debtor and made a part of the deed of assignment, and the court decided that the neglect by the debtor to make out a list of assets and liabilities, referred to in the deed as part thereof, would not render the deed of assignment inoperative. If the neglect of the debtor himself to make out a schedule of his assets and liabilities would not render the deed fraudulent in law, much less likely would it be that the neglect of the assignees to make out such schedule would render the deed of assignment fraudulent in law for the want of such schedule. The want of such schedule has been many times held to be, prima facie, a presumption of fraud. See Stevens v. Bell, 6 Mass., 339; Pierpont v. Graham, 4 Wash. C. C., 232; Wilt v. Franklin, 1 Binn 523; Burd v. Smith, 4 Dall., 76; Hover v. Geesaman, 17, S. & R., 251; Halsey v. Whiting, 4 Mason, 206; Haven v. Richardson, 5 N. Hamp., 113; Cunningham v. Freehorn, 11 Wend., 241.

In this last case, contained in 11 Wend., 241, the court says, the fact that the assignment was unaccompanied with any schedule of the property assigned, or a list of the creditors to be paid, are not such indicia of fraud as will justify a court of equity to pronounce the assignment void, where the case is submitted on bill and answer, in the latter of which the fraudulent intent is denied. The fraud in the case now under consideration is alleged in an affidavit in attachment, and is denied in the answer of the defendants to that affidavit, which renders the above case one peculiarily in point. In the case above cited of Stevens v. Bell, 6 Mass., 339, the court decided, that where a schedule was to be made out as soon as might be, and also an account of the debts and liabilities, which were to be arbitrated in case of dispute, the presumption of fraud was held to be removed. In the above cited case of Pierpont v. Graham, 4 Wash. C. C., 232, the court decided, that if possession of the property assigned accompany the transfer, and the transaction be in all other respects fair, the mere want of a schedule will not render it fraudulent. This opinion is also sustained by the case of Deaver v.

Savage, 3 Miss., 352; and also by the case of Robinson v. Sapelge, 2 Stew., 86.

In the above cited case of Wilt v. Franklin, 1 Binn., 523, the court say that the "want of a schedule is less suspicious where the whole of the assignees' property is conveyed for the benefit of all the creditors than where part of it is conveyed for particular creditors." In the case of Emerson v. Knower, 8 Pickering, 63, it was decided that "an assignment containing a release of the demands of creditors executing and providing that a schedule of the debtor's property shall be annexed "as soon as may be," is valid, though no such schedule is annexed—the annexing of it not being a condition precedent. The authority of this case is supported by the case of Keys v. Brush, 2 Paige, 311, in which case it was further held by the court, that, "if the assignor neglects to furnish such schedule, the assignee may file a bill of discovery against him, and also to obtain a delivery of the books."

From these authorities it seems that the deed of assignment in this case is not fraudulent in law, for the want of a schedule of assets and liabilities. It is true, that in the case of Drakeby v. Defaset, 3 Conn., 272, the court decided that a deed of assignment of goods, not identifying them, and referring only to a now existing schedule for a description of them, was invaled as an instrument of conveyance; but in the same case it was also held, that such a deed was effectual as a declaration of trust, and the reception of the goods by the assignee being an assumption of that trust, constituted a sufficient consideration for the assignment. In addition to this authority, upon the necessity of a schedule, the counsel for the appellee has cited the court to the case of the United States v. Bank of the United States, 8 Rob. R., 305; Naylor and Sandersar v. Fosdick, 4. Day, 146; Burd v. Smith, 4 Dall., 76. In the case of the United States vs. the Bank of the United States, the court does not say that the want of a schedule renders the deed void or fraudulent in law; the court only said that the absence of any schedule of the property assigned is evidence of fraud. In the same case the court decided that "considered per se, the absence of the schedule, though an indicium of fraud, would not be conclusive;" and if the presumption were impelled by everything apparent on the deed and by everything proved aliunde, the deed would be sustained. To say that inconclusive indicia of fraud constitute a fraud in law, is drawing a certain conclusion from uncertain premises, which is just as inadmissable in law as in logic. In the case of Burd vs. Smith, 4 Dall., 76, many other claimants, beside the absence of an annexed schedule, entered into the decision, two judges dissented, and the judges of Pennsylvania afterwards said, that the main point decided in that case was, that the assignment was void because the shares of those who did not express their assent were to be paid over to a notoriously insolvent debtor, and that there was not time for all the creditors to have

notice of the assignment, and express their assent within the limited time. 1 Binn., 515, 528.

In the case of Jenks v. Parry, 5 Rawle, 225, Gibson, C. J., in commenting upon the above case of Burd vs. Smith, 4 Dall., 76, says: "Indeed the reasons of the judges are so indistinctly set forth in that case, the discrepance of their views is so remarkable as to render it of little value as a precedent." The only remaining case of any authority in which the absence of a schedule was held to invalidate the deed of assignment is the above cited case of Drakely & al. v. Deferset and al., 3 Conn. Rep., 272. This case was reviewed in the case of Clark v. Mix, 15 Conn. Rep., 176; and the court then said: It is further objected that the assignment was invalid as it referred to an instrument not then existing; and reliance is placed upon the case of Drakely & al. v. Deferset & al., 3 Conn. Rep., 272. In that case there was no specification or description at all of the property, but a reference to a schedule not then made; and the court held that all depended upon the schedule. But this is an assignment of all the property of the firm in this state, excepting household furniture, a schedule of which is to be made and annexed thereto as soon as may be. The assignment, then, is complete; but for the greater facility in finding the goods the schedule is to be made. In Emerson & al. vs. Knower, 8 Pick., 63, 65, there was an assignment of a quantity of leather and stock for the manufacture of boots and shoes, and of boots and shoes already made, or partly made, in the hands of certain persons, with a proviso that a schedule of the property should be made and annexed as soon as may be, and the supreme court of Massachusetts held that the conveyance was good; that the annexation of a schedule was not a condition on which the validity of the assignment depended, and that the covenant was not essential—the property, and the place where it was to be found, being mentioned. And it is said that the words, as soon as may be, prove that it was not considered by the parties as affecting the validity of the assignment. A similar decision was made in New York, in the case of Keyes v. Brush, 2 Paige, 311; and we concur in the views taken by the court in these cases. So far as the want of a schedule is concerned, this case of Clark v. Mix, 15 Conn. Rep., 176, overrules the case of Drakeley & al. v. Deferset & al., 3 Conn. Rep., 272.

For the supreme court of Massachusetts, in the case of Emerson & al. v. Knower, 8 Pick., 63, 65, say that the covenant in the deed of assignment as to the schednle was not essential; and 64, J. Williams, in the above case of Clark v. Mix, 15 Conn. Rep., 176, says "he concurs in the views taken by the supreme court of Massachusetts in that case of Emerson & al. v. Knower, 8 Pick., 53, 65." It would thus seem that the position that the deed of assignment now under consideration is fraudulent in law for the want of schedules of assets and liabilities is without authority to sustain it,

except the case of Burd v. Smith, 4 Dallas, 76, which, it has already been seen, is of "little value as a precedent," and that authorities are numerous which assert that a deed of assignment is not fraudulent in law for the want of such schedules. The court below in this case further instructed the jury that the deed of assignment was fraudulent in law because of the want of a schedule thereto annexed of the preferred creditors, and because of the preference given to some creditors by said deed. The only way in which a preference can be given is by naming the preference creditors, specifying the amount due them, and directing them to be first paid, or, by referring to them as class in such definite terms as clearly to indicate to the assignees who they are so preferred. Now if this deed of assignment does indicate in the above manner who are preferred, then the deed itself is a sufficient schedule of the preferred creditors, and no other was necessary. If the deed does not so indicate who are the preferred creditors, then no preference is given by the deed, and it must be considered as a general assignment, for the benefit of all the creditors per rata. To say that this deed is fraudulent in law because of the preference given, and because there is no list of the preferred creditors, is equivalent to saying that the deed is fraudulent in law because it prefers creditors and because it does not prefer them, two propositions which cannot be very well predicated of the same instrument.

If the assignor, in describing his preferred creditors, indicate some with certainty and others so indefinitely that they could not come in under the deed, as preferred creditors, because of this uncertainty, it still forms no valid objection to the deed; for where rights are multifarious, the uncertainty of one man's right cannot defeat the certain right of another. Now, it is certain, without any annexed schedule, that a debit of $19,944 $\frac{12}{100}$ to Lewis & Courtney, $1,745 $\frac{50}{100}$ to Modie and Simpson, $462 $\frac{33}{100}$ to A. La Raux, and $1,450 to Henry O'Neil, is prefixed; and if this deed of assignment is in other respects valid, their rights, under the deed, cannot be defeated, because it may be uncertain whether simple depositors, or tenders of money without interest, are entitled to preference or not. In the case of Da Costa v. Gwin, 75, and R., 462, the assignment was made for the payment (among others) of "all accomdation notes subscribed or endorsed for the assignors, so as to exonerate the makers or endorsers of the said notes from their liability therefor; it was held, that a bill drawn on the assignors for their accommodation, in favor of and endorsed by the drawer, and accepted and negotiated by the assignors, was within the preference given by the clause." This clause thus held good, in the above case, is quite as indefinite as any clause in the deed of assignment now before the court. A preference may be created for a class of debts, without naming the holders of those debts, and this preference will enure to the benefit of all who hold claims, properly belonging to the preferred class of debts; and whether the debt of A B or C D,

does or does not fall within the preferred class, seems to be susceptible of proof, *denors* the deed. In this deed of assignment, there is a covenant upon the part of Smith and Biggs, for the making proper schedules in ten days, and annexing them to the deed; it appears from the evidence that proper schedules were made out within the time, but not annexed to the deed. What is the object of these schedules? The object is, first, to let the assignees know what assets have been transferred to them, and on whom. Second, to let the assignees know what debts they have to pay, and to whom; and these objects are just as well effected with proper schedules in the hands of the assignees, unattached to the deed, as if they were fastened to it "with hooks of steel." The assignees are agents and trustees of the creditors, and all books, papers, and schedules in the hands of said assignees, whether attached or unattached to the deed, are open to the examination or inspection of any creditor who may wish to examine them, and it cannot well be perceived how a creditor could obtain any more information from reading a schedule attached to the deed that could be obtained from reading the same schedule unattached to the deed. In this case, possession of the property assigned was immediately given, and all the property of the assignor is devoted absolutely to the benefit of his creditors, without any reservations or stipulations for his own advantage. In the case of Gover v. Wakeman, 11 Wend., 200, Mr. Justice Sutherland decided, that "where the assignor parts with all control over the property, and devotes it absolutely to the benefit of his creditors, without any reservation or stipulations for his own advantage, the honesty of his intention is so apparent, and the advantage to the creditors so direct and decisive, that they cannot be said to be obstructed or delayed in their remedies." Outside of the instructions of the court in this case, it is contended by the counsel of the appellee that this deed is fraudulent in law, for the want of assent upon the part of the creditors, or at least of the preferred creditors. It is undoubtedly the law, that "where a conveyance is made directly to creditors in consideration of indebtedness, the assent (actual or to be presumed) is necessary." The point was expressly decided in the case of Tompkins v. Wheeler, 16 Peters, 106, 119. But where a conveyance is to a trustee for their benefit, their assent where there is nothing fraudulent in the deed, is not necessary, as appears from the following cases: Nicall v. Munsford, Johnson's Chancery, 523, 529; Cunningham v. Freeborn, 11 Wend., 241, 249; Halsey et al. vs. Whitney et al., 4 Mason, 207, 214; Houston vs. Nowland, 7 Gill & Johnson, 480, 492; Bank of the U. S. et al. v. Huth., 4 B. Monroe, 423, 437.

In Massachusetts the assent of a creditor to render an assignment valid as against him, is necessary, as appears from the following cases:

Russell v. Woodward, 10 Pickering, 408; Stevens et al. v. Bell, 6 Mass., 339, 342; Widgery et al., v. Haskill, 5 Mass., 144, 154.

But from an examination of these cases in Massachusetts, it will be found that the decisions are grounded upon the difficulty formerly felt respecting the power of the courts in that State to compel the trustee to execute the trust, and since the passage of the act of 1836, c. 238, which gives the creditors a remedy against the trustee, the assent of creditors is even no longer necessary, even in Massachusetts, as appears from a decision of the court in the case of Shattuck v. Freeman, 1 Metcalf, 10.

The court in the case now under consideration instructed the jury:

"That if the jury found that the defendants, or either of them, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors at the time of the commencement of this suit, they must find for the plaintiff."

This position, in the broad language here laid down, is at least, if doubtful, authority in the present case, under the issue on the affidavit in this case. The affidavit asserts that Leitensdorfer and Houghton have made a fraudulent disposition of their property and effects, so as to defraud, hinder, or delay their creditors. The answer denies this allegation, and it would seem to be under that issue incumbent upon Webb to prove, that both Leitensdorfer and Houghton have made this frandulent disposition of property. If the affidavit in this case had said that Leitensdorfer and Houghton had concealed themselves, or absconded, or absented themselves from their usual place of abode in this Territory, so that the ordinary process of law could not be served upon them, would it have been sufficient to sustain such affidavit to prove that Leitensdorfer alone had so absconded, while Houghton remained at Santa Fé, unconcealed and at his usual place of residence?

If the civil law is to be applied to and govern this case, by the civil law on (one) partner is not liable for the frauds of another.

In L. 7, tit. 10, p. 5, says, "that the injuries arising from the fault of any particular partner are chargeable entirely to him." See 1 vol. land law in California, Oregon, Texas, &c., page 207.

This position is fully sustained by the decision of the court in the case of Pierce v. Jackson, 6 Mass. Rep., 245, say: "But a tort, or even a fraud, committed by one of the partners, will not bind the partnership, if it be not in a matter of contract, and there be no participation in it." The authority of this case is fully sustained by the case of Sherwood v. Marmek, 5 Greenleaf, 295. That a fraud committed by one partner in a matter of contract, or in the usual course of business, does bind the firm is too well settled to need the citation of authorities to support it. But a fraud rendering one partner liable to the attachment is not within that rule.

The proof in such case would not sustain the allegation set out in the affidavit. That one partner should be held liable for the

fraud of another, unless he was privy to or connived at it, or by his affirmance made it his own, is a doctrine not found in reason, justice, or law.

The fraud of one partner, which entitles a creditor to his attachment is no more the fraud of another partner than the larceny or murder of one partner is the larceny or murder of the whole firm.

In the matter of Peter S. Smith, an absconding debtor, 16 John., 102, 109, the court says: "We have considered an attachment under the act for relief against absent and absconding debtors as analogous to an execution, and in the matter of Chipman, 14 John.'s Reports, 217, we decided that it might issue where one of several partners had absconded for a partnership debt; but the sheriff can take the separate property only of the absconding debtor. He cannot seize the partnership effects, for the other partner has to retain and dispose of them for the payment of the partnership debts." In this case the deed is under seal and runs in the name of Leitensdorfer alone, is signed by him alone, and he describes himself as of the firm of E. Leitensdorfer and Company. Now whether an acting partner has authority in law, in the absence of the the other member of the firm, to execute a general assignment of all the partnership personal property to trustees for the payment of the debts of the firm, though without the knowledge or consent of the other partner, is a question upon which authorities are not uniform. The following authorities affirm such power: 3 Kent's Com., 20, 25; 3 Mo. Rep., 252; Hodges vs. Harris, 6 Pickering's Rep., 362; Low on Partnership, 95; Anderson & Hilkins vs. Tompkins et al., and Hamson vs. Steny, 5 Cranch, 289, 300; McCullough et al. vs. Sommerville, 8 Leigh, 416, 431; Robeson & Co. vs. Crowder, Clough & Co., 4 McCord, 519, 537; White vs. Union Insurance Co., 1 Nott & McCord, 557, 560; Hennessy vs. The Western Bank, 6 Watts & Sergeant, 301, 311. The following authorities deny such power: Dickerson vs. Legaré et al., 1 Desanssure, 537, 540; Pearpont & Lord vs. Graham, 4 Washington, 232; Hughes vs. Ellison, 5 Missouri Rep., 463, 466; Drake vs. Rodgers and Shrewsberry, 6 Missouri, 317, 320. In New York it is held that one partner may assign the partnership effects directly to creditors in discharge of their debts; but cannot, without the consent of the other, make a general assignment to a trustee for the benefit of creditors with preferences: Haven vs. Hussy, 5 Paige, 30; Hitchcock et al vs. St. John et al, 1 Hoffman, 512, 517.

The weight of authority seems to be in favor of the existence of the power. The deed of assignment in this case is under seal, and it is a well settled, general principle of law, that the general applied power of a partner does not extend to binding the firm by instrument under seal. See Harrison vs. Jackson, 7 Tenn., 207; Clement vs. Brush, 3 Johnson's Cases, 180; Van'Denson vs. Blum,

18 Pickering, 229; Ex. of Fisher vs. Ex. of Tucker, 1 McCord's Cases, 169, 171; Pasey vs. Bullitt, 1 Blackford, 99; Trimble vs. Coons, 2 Marshall's Kentucky Rep., 375; Cummins & Co. vs. Cassiby, 5 B. Munroe, 74; Blackburn vs. McCallister, Pick., 371; Nunnelz vs. Doherty, 1 Yeger, 26; McNaughten et al. vs. Partridge et al. 11 Ohio, 223; Doc. on Dem. vs. Tupper, 4 Smedes and Marshall, 261.

But the above general principle, that a partner cannot enter into agreements under seal, has received this important qualification, that where a seal is not essential to the nature of the contract, and will not change or vary the liability, the addition of a seal will not vitiate it; and that where an act is done which one partner may do without deed, it is not less effectual that it is done by deed. This appears to be settled in reference to operations that transfer an interest; and it has been decided in cases of sales and assignments, where the property may be transferred by delivery, that such a transfer, so consummated by delivery, is not annulled by being attested or having the trusts in which it is made described by a deed; and this applies to a general assignment for the benefit of creditors, to a mortgage of chattels, and to an assignment of a clue in action, by one partner under seal. See Anderson & Wilkins vs. Tompkins et al. and Robenson & Co. vs. Crowder, Cough & Co., 4 McCord, 519, 537; Becard vs. Cane, 5 Watts, 22; Halsey et al. vs. Whitney et al., 4 Mason, 207, 231; Hennessy vs. The Western Bank, 6 Watts & Sergeant, 301, 311; Everet vs. Strong, 5 Hill's N. T., 163; Tapley vs. Butterfield, 1 Metcalf, 515; Milton et al. vs. Masher, 7 Metcalf, 244, 248; McCullough et al. vs. Sommerville, 8 Leigh, 416.

Thus far, the case has been viewed through the lights thrown upon it by the common law. This case of attachment originated under a statute of this Territory, fixing a common law mode of procedure, and the case was tried by a jury, a thing unknown to the civil law, and the deed of assignment was introduced merely as an instrument of evidence to sustain a statutory issue of fraudulent intent or not, and as a mere instrument of evidence, its admissibility as evidence, and the legal effect of the instrument upon its face as a matter of evidence, would seem to be more appropriately determined by the principle and rules of the common law. The case might be different, if the suit was upon the deed, or the rights of the parties under it were directly in issue; then, perhaps, the common law rules would give place to the civil law. To proceed with a case according to common law, so far as the issues are concerned, and the trial of these issues by a jury, and the examination of witnesses orally at the bar, and when written evidence happens to be introduced, to drop all these common law rules of procedure, and commence a pilgrimage through the ancient civil law for our guidance, would seem to result in a mongrel mode of practice, unfavorable to the administration of justice, either upon common law

principles or civil law principles. The question will now be considered whether, even by the civil law, this deed of assignment is void and fraudulent in law. At the time this deed was made, Leitensdorfer was the absolute owner of the property assigned, had it in his possession, and under his control; it was not pledged, pawned, or mortgaged, and no creditor had obtained any lien upon it by attachment, or otherwise. Under such circumstance, it was not contrary to the civil law for him to dispose of it, for one of the first and plainest principles of the civil law is, that "the absolute ownership of property confers the right to enjoy and dispose of it as you please." See civil law of Spain and Mexico, by C. Schmidt, T. 11, art. 188, page 45.

By the civil law fraud was treated as a crime, and was "never to be presumed, if there was no proof of it," Domat, vol. 1, p. 511. The rule laid down in the civil law by which to determine what was a fraud by a debtor upon his creditors, is this: If the act of the debtor diminished the estate which he had already acquired, it was a fraud upon the creditor; if it did not diminish the estate already acquired, it was no fraud upon the creditor. Domat, in speaking of the Roman law, says: "they did not look upon anything as a fraud done to the prejudice of the creditors, except what was a diminution of the estate which the debtor had already acquired."—Domat, vol. 1, page 637. How this deed, which consigns all the debtor's property to the payment of his debts, can be considered as a diminution of the estate of the debtor, cannot be perceived, unless the whole of anything is less than the sum of all its parts. The doctrine of assignments is clearly recognized by Domat, vol. 1, page 642. He says: "The creditor who receives from his debtor that which is due to him, commits no fraud, but does him justice, by taking care of his own interest, as it is lawful for him to do. And although his debtor be found insolvent, and because of the said payment, there does not remain enough to satisfy the other creditors, or there even remains nothing at all for them, he is not bound to restore what he has received for his own payment, but the other creditors ought to blame themselves for not having been as watchful of their interest as he has been of his who has got the payment." Farther, says Domat: "If, after the seizure of the goods of a debtor, or after a debtor has assigned over his goods for the satisfaction of his creditors, one of them receives payment of his debt, either out of the stock of goods that have been seized, or out of what has been made over to the creditors, he shall be obliged to share with the other creditors what he has received; because, in that case, he takes to himself that which belongs in common to all the creditors. But this is not to be understood of what one who has seized on the movables of his debtor, may have received by means of his diligence before the other creditors has entered his actions." But it may be contended that, admitting the right of the debtor to pay his creditor, by the transfer and delivery of property, it does

not follow that he could so pay or transfer his property to an attorney or trustee of his creditor. This point seems to be settled by the civil law, which says: "A contract may be for the benefit of a third person, not party to it, whether it has for its object to liberate him from some obligation, or to acquire some right." See civil law of Spain and Mexico, by G. Schmidt, art. 432, page 97.

This deed is for the benefit of third persons, the creditors of Leitensdorfer and Company, and has for its object the liberation of Leitensdorfer and Company from their debts, as far as the property assigned will go; and also has for its object the acquisition, upon the part of the creditors, of a right to that property and its proceeds for the extinguishment of said debt as far as it will go. Domat, page 695, when speaking of the several sorts of assignments, says: "And there are some assignments which are made for a valuable consideration: as if a debtor assigns a debt that is owing to him for the payment of his creditors, or if a creditor makes over to a third person, for a certain price, a debt that is due to him."

Now if a debtor can assign one debt owing to him to pay one creditor he owes, may he not, in accordance with the civil law, assign all the debts owing to him and all his property to pay his creditors, in the order he directs them to be paid? The distinction would seem to be a distinction without a difference. If a debtor, in accordance with the doctrines of the civil law, could pay his debtor a part of it, by giving his creditor one sheep, the inference is legitimate that he might pay his debts as far as he could by the transfer of his whole flock to his creditors, or such of them as he wished to privilege.

This deed of assignment, under the civil law, may be regarded as a pledge, upon the part of Leitensdorfer & Co., of all their property and effects to Smith & Biggs, with authority to sell the things pledged for the payment of debts, as directed in said deed of assignment, which is evidence of the contract between the pledger and the pledgees; and Domat, page 928, says: "In the case of discomfiture or insolvency, the creditor who is in possession of a pledge, which the debtor had given him for his security, is preferred upon that pledge before the other creditors." It is an admitted principle of the civil law, that no one has the right, of his own authority, to take possession of the property of his debtor and retain it as a pledge, without previous order from the judge, unless the debtor has given him this power. See Fuero Juzgo, f. 1, t. 6, b. 5; Fuero Real, t. 2, t. 19, b. 3; Partidas, t. 11, t. 13, p. 5.

The converse of this proposition, upon principle, ought to be true, and the authority would then say, any one has the right on his own authority to take possession of the property of his debtor, and retain it as a pledge, without previous order from the judge, if the debtor has given him this power. It would thus seem, that, by the civil law, this deed of assignment is neither void nor fraud-

ulent in law. Had all the facts connected with this deed of assignment, tending to show either a fraudulent or honest intent, been submitted to the jury for their consideration, their verdict would have been a satisfactory settlement of the issue submitted to them. Such was not the case, however.

The court below, on the trial of this case, in substance told the jury that the deed of assignment was fraudulent in law, and proved the plaintiff's affidavit to be true, and they must therefore render a verdict for the plaintiff. We think the court below has taken for fraud in law circumstances only tending prima facie to prove fraud. An examination of very many cases already cited in the progress of this opinion fully sustain this view.

The defendants asked the court to instruct the jury, that as the assignment was the act of Leitensdorfer alone, with which Houghton had nothing to do, the act of one defendant would not authorize an attachment against two, and the verdict must be for the defendants. This instruction was rightly refused to be given, upon the ground that it assumed as true disputed facts, proper to be determined by the jury from the weight of the evidence. The defendants also asked the court to instruct the jury "that the deed of assignment was not fraudulent in law, and unless the jury find, from the evidence, that in fact, at the time of the commencement of this suit, the plaintiff had good reason to believe that the defendants had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, they must find for the defendants." We see no objection to this instruction, and think it ought to have been given to the jury. Upon the other points in this case, I fully concur in the opinion of the chief justice; but because of the above errors in the instructions of the court, and because of the refusal of the court below to give the 2nd instruction asked for by the defendants, I think such error supervened as entitled the defendants to a new trial, and that the motion for a new trial should have been granted in the court below, and because it was not granted, this case ought to be reversed and sent back to to the court below for further proceedings herein.

And afterwards, to wit, on the first day of March, of the year last aforesaid, the following order was made in said cause, to wit:

Error to the Santa Fé county, first district.

EUGENE LEITENSDORFER and JOAB HOUGHTON
vs.
JAMES J. WEBB.

The following order is made in this cause, to wit:

This cause came on to be heard on the transcript of the record from the district court of the United States, for the first judicial

district of the Territory of New Mexico, and was argued by counsel, on consideration whereof, it is now here ordered and adjudged by this court that the judgment of the district court in this cause be and the same is hereby affirmed with costs.

UNITED STATES OF AMERICA,
Territory of New Mexico, County of Santa Fé.

I, Augustus De Marle, clerk of the supreme court for the Territory of New Mexico, do hereby certify that the foregoing one hundred and twenty-one pages contain a complete transcript of all the papers, pleadings, journal entries, judgment, and other orders of said court, in the case of James J. Webb against Eugene Leitensdorfer and Joab Houghton, as the same remains of record in my office, and that this transcript has been correctly copied therefrom.

In testimony whereof, I have hereunto set my hand and private [SEAL.] seal, no official seal having been provided for, this 30th day of September, A. D. 1856.

A. DE MARLE,
Clerk.

The United States of America, to James J. Webb, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein Eugene Leitensdorfer and Joab Houghton are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable , Associate Justice of the Supreme Court of the United States, this day of July, in the year of our Lord one thousand eight hundred and fifty-six.

(Signed) J. A. CAMPBELL,
Associate Justice Supreme Court U. S.

On this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and fifty-six, personally appeared W. W. H. Davis before me, the subscriber, a justice of the peace in and for the county of Santa Fé, and Territory of New Mexico, and makes oath that he delivered a true copy of the within citation to Robert Campbell, and Doan, King & Company, of St. Louis, on the 22d day of August, 1856, and to James J. Webb, plaintiff of record, of Santa Fé, New Mexico, on the twenty-fifth day of September, 1856.

W. W. H. DAVIS.

Sworn and subscribed before me, the day and year above written.

NICHOLAS QUINTANA,
Justice of the Peace.

Know all men by these presents, that we, Caleb Cushing, of the city of Washington, and William W. H. Davis, of the Territory of Utah, are held and firmly bound unto James J. Webb in the full and just sum of five hundred dollars, to be paid to the said James J. Webb, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this day of July, in the year of our Lord one thousand eight hundred and fifty-six.

Whereas, lately, at a supreme court of the Territory of New Mexico, in a suit depending in said court, between Eugene Leitensdorfer and Joab Houghton, plaintiffs in error, and the said James J. Webb, defendant in error, judgment was rendered against the said Eugene Leitensdorfer and Joab Houghton; and the said Eugene Leitensdorfer and Joab Houghton having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James J. Webb, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Eugene Leitensdorfer and Joab Houghton shall prosecute their said writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

C. CUSHING, [SEAL.]
[SEAL.]
(Signed) W. W. H. DAVIS, [SEAL.]

Sealed and delivered in presence of—
(Signed) H. AMIDON.

Approved by—

UNITED STATES OF AMERICA.

The President of the United States, to the honorable the judges [SEAL.] of the supreme court of the Territory of New Mexico, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in

which a decision could be had, in the said suit between Eugene Leitensdorfer and Joab Houghton, plaintiffs in error, and James J. Webb, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States; and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Eugene Leitensdorfer and Joab Houghton, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Roger B. Taney, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-five.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Allowed by

JOHN A. CAMPBELL,
Associate Justice of the Supreme Court of the U. S.
18 July, 1856.